

**O'Brien v Yee**

2014 NY Slip Op 30395(U)

February 10, 2014

Sup Ct, New York County

Docket Number: 114901/09

Judge: Joan B. Lobis

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

PRESENT: \_\_\_\_\_  
Justice

PART 6

MARYANNE O'BRIEN,

INDEX NO.

114901/09

MOTION DATE

11/29/13

MOTION SEQ. NO.

2

MOTION CAL. NO.

JACK YEE, The HUDSON VALLEY  
MEDICAL GROUP, PLLC.

- v -

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

FEB 18 2014

COUNTY CLERK'S OFFICE  
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

Dated: 2/10/14

Joan B. Lobis  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
MARYANNE O'BRIEN,

Plaintiff,

Index No. 114901/09

-against-

**Decision and Order**

JACK YEE, THE HUDSON VALLEY MEDICAL  
GROUP, PLLC, HUDSON VALLEY HOSPITAL  
CENTER, DOUGLAS KAIDEN, EMERGENCY  
MEDICAL ASSOCIATES,

**FILED**

Defendants.

FEB 18 2014

-----X  
**JOAN B. LOBIS, J.S.C.:**

COUNTY CLERK'S OFFICE  
NEW YORK

This medical malpractice case arises out of the care and treatment of Maryanne O'Brien's appendicitis. Ms. O'Brien sues Jack Yee, M.D., The Hudson Valley Medical Group, PLLC, Hudson Valley Hospital Center, Douglas Kaiden, M.D., and Emergency Medical Associates, alleging medical negligence and lack of informed consent. Defendants Kaiden and Emergency Medical Associates move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, that motion is denied.

On Monday, April 23, 2007, Maryanne O'Brien was driven by her 21-year-old son to the emergency room at Hudson Valley Hospital Center. Upon her arrival at 2:26 p.m., Ms. O'Brien, age 48, complained of stomach pain since the day before, described as constant, crampy lower abdominal pain. She had decreased urination and appetite. She gave a detailed medical history and listed her medications.

Dr. Douglas Kaiden, who was the attending physician in the emergency room at the

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time that Ms. O'Brien was brought in, performed her physical examination. He described her abdomen as tender in multiple areas but not distended. He detected some bowel sounds and moderate tenderness in the mid-epigastrium and bilateral lower quadrants. He found no guarding, rebound tenderness or palpable masses.

Approximately ten minutes after Ms. O'Brien's arrival, following his physical examination, Dr. Kaiden ordered a series of tests, including blood and urine. He prescribed intravenous hydration and pain medication. One hour and fifteen minutes later, at 3:50 p.m., after determining from the test results that Ms. O'Brien was not pregnant, Dr. Kaiden ordered an abdominal CT scan with contrast. Ms. O'Brien began drinking the contrast at 4:00 p.m. and finished forty minutes later. Dr. Kaiden testified in his deposition that, for optimal images, the patient needed two hours to digest the contrast before the test.

While Ms. O'Brien was digesting the contrast, Dr. Jack Yee, who was the hospital's on-call surgeon for emergency cases, spoke with Dr. Kaiden in the emergency room at 5:10 p.m. Dr. Yee evaluated Ms. O'Brien. He then went home.

At 6:35 p.m., Ms. O'Brien's CT scan was performed. At 7:40 p.m., Dr. Kaiden spoke with the radiologist who had performed the test and was informed that Ms. O'Brien had ruptured her appendix. Dr. Kaiden paged Dr. Yee and instructed a nurse to give Ms. O'Brien more pain medication and begin her on antibiotics intravenously. Five minutes later, Drs. Kaiden and Yee spoke regarding Ms. O'Brien's CT scan results. Arrangements were made for her to be admitted to the hospital for surgery.

At 8:45 p.m., Dr. Yee reexamined Ms. O'Brien. He found that she had rapid pulse, low blood pressure, and her abdomen was diffusely tender. Ms. O'Brien was taken into surgery five minutes later and was in the operating room by 9:30 p.m. Dr. Yee performed a laparoscopic appendectomy fifteen minutes later, which was completed at 10:35 p.m. The appendix was found to be both ruptured and gangrenous, which Dr. Yee estimated developed over "hours to a day or two." He also found that she had peritonitis. He expected that she would require at least three days hospitalization.

Ms. O'Brien suffered numerous complications following her surgery. The day after the surgery, Dr. Yee went away and did not return until May 2, 2007. In the meantime, Ms. O'Brien experienced respiratory distress, as a result of sepsis from her peritonitis. She was diagnosed with acute respiratory distress syndrome and was intubated to oxygenate her adequately. She also developed an intra-abdominal abscess, which Dr. Yee attributed to her peritonitis. The day after Dr. Yee returned, Ms. O'Brien developed deep vein thrombosis in her right leg, which he attributed to her inactivity due to sedation and ventilation. She was not discharged from the hospital until May 19, 2007, at which time she required in-patient rehabilitation therapy at an area nursing home to improve her strength that had diminished due to intubation and inactivity. She no longer works, receives disability, and has been diagnosed as having brain injury from her respiratory distress.

In October 2009, Ms. O'Brien filed suit. She alleged medical malpractice and lack of informed consent. Following disclosure in this action, Defendants Kaiden and Emergency Medical Associates, Dr. Kaiden's then-partnership, moved for summary judgment. They claim that there are no genuine issues of material fact and that they are entitled to summary judgment as a

matter of law.

In support of their motion, the movants provide an expert opinion by David Barlas, M.D. Dr. Barlas has been a New York-licensed physician since 1994. He is board-certified in emergency medicine and is an attending physician at New York Hospital Medical Center of Queens. Dr. Barlas opines that none of the Plaintiff's allegations in her bill of particulars "constitute a departure." He contends that in light of Ms. O'Brien's presenting condition, her history and the clinical findings, the CT scan ordered in this case was timely and appropriately ordered. On the issue of proximate cause, Dr. Barlas states that the rupture was prior to Ms. O'Brien's arrival at the emergency room and states that there was no proximate cause between Dr. Kaiden's conduct and the events of April 27, 2007, when Ms. O'Brien went into respiratory distress. He does not address Plaintiff's claim of lack of informed consent.

Plaintiff O'Brien opposes Dr. Kaiden's and Emergency Medical Associates' motion. She claims that they failed to establish a prima facie case of entitlement to summary judgment, and there are disputed issues of material fact. In support, she offers an expert opinion by Michael R. Golding, M.D. Dr. Golding has been a New York-licensed physician since 1959. He affirms that he has served as the director of surgery at a "major New York City hospital" for over twelve years. He is board-certified in general surgery and thoracic surgery.

Dr. Golding asserts that the movants departed in failing to timely order and perform Ms. O'Brien's CT scan, diagnose her condition, and have surgery timely performed. These missteps directly caused Ms. O'Brien's complications. He opines that the rupture occurred during her

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treatment at the hospital, not before. He contends that the delay was a substantial factor in her deterioration, allowing her infection to progress unfettered, and the movants created five hours of additional delay between when surgery should have been performed and when it was conducted. For example, Dr. Golding contends that Dr. Kaiden, rather than delaying the order of an abdominal CT scan until 3:50 p.m., should have ordered one without contrast upon completion of his physical exam of Ms. O'Brien at 2:35 p.m., and immediately had surgery performed upon those results. Dr. Kaiden unnecessarily delayed Ms. O'Brien's diagnosis and treatment, admission to the hospital and emergent surgery. He further questions why Dr. Kaiden did not obtain the results of the CT scan until 7:40 p.m., when it was performed at 6:30 p.m., an additional delay of over an hour. Earlier surgical intervention would have prevented Ms. O'Brien's complications and avoided prolonged spread of infection. He disputes Dr. Barlas's contentions that the movants' treatment of Ms. O'Brien was proper and timely, and opines the departures proximately caused Ms. O'Brien's complications.

In reply, the movants dispute Plaintiff's claim that they failed to establish a prima facie case. They further deny that material issues of fact remain. They criticize Dr. Golding's opinion as conclusory.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. *E.g., Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. *Id.* This Court may grant the motion if, upon all the papers and proof submitted, it is

established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer’s Estate, 93 A.D.2d 355 (1st Dep’t 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep’t of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep’t 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from



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accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

As a threshold matter, the motion fails to address Plaintiff's second cause of action, lack of informed consent. Therefore, this Court will construe the motion as one for partial summary judgment on the only other cause of action alleged, medical malpractice, set forth in the complaint's first cause of action.

Turning to the medical malpractice cause of action, this Court finds that the movants have shown a prima facie case for summary judgment. Dr. Barlas opined that there have been no departures and that Dr. Kaiden's conduct in ordering a CT scan with contrast was proper. Dr. Barlas further opined that any departures by the movants did not contribute to Ms. O'Brien's complications.

This Court finds, nevertheless, that Plaintiff has presented genuine issues of material fact. Her expert disputes Dr. Barlas's findings and highlights the material issues of facts that remain for the jury, including the propriety of Dr. Kaiden's decision to delay diagnosis by holding off on ordering a CT scan until he could do one with contrast. The opposition further challenges the attending delays accompanying that determination, including the delay in reporting results and the delay in retrieving the on-call surgeon who had already left the hospital for home while the CT scan with contrast was in progress. Under Dr. Golding's scenario, had Dr. Kaiden ordered a CT scan without contrast immediately following his physical examination of Ms. O'Brien shortly after she arrived in the emergency room, assuming the test were to similarly confirm appendicitis, Ms. O'Brien's surgery would have been performed before Dr. Yee went home after 5:10 p.m. Instead, Ms. O'Brien's surgery did not take place until 9:45 p.m., and she did not even begin to receive

[\* 9]  
antibiotics for her attendant infection until 7:40 p.m. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties appear for a pretrial conference on March 4, 2014, at 9:30

am.

Dated: Feb. 10, 2014

ENTER:

  
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JOAN B. LOBIS, J.S.C.

**FILED**

FEB 18 2014

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