SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

----------X

INDEX NO. 152361/2016

MARIA MACHADO,

MOTION DATE 07/11/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

UNITED MEDICAL PRACTICE ASSOCIATES, P.C, UNITED MEDICAL PRACTICE ASSOCIATES-CARDIOLOGY, MOUNT SINAI DOCTORS FACULTY PRACTICE, THE ST. LUKE'S - ROOSEVELT HOSPITAL CENTER D/B/A MOUNT SINAI ST. LUKE'S, MOUNT SINAI WEST

DECISION AND ORDER

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff Maria Machado commenced this action alleging that she sustained personal injuries when she fell on a treadmill during a stress test conducted at defendants The St. Luke's-Roosevelt Hospital Center d/b/a Mount Sinai St. Luke's and Mount Sinai West's facility located in New York, New York.[1] Defendants move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing all claims and causes of actions as against them. For the reasons set forth below, defendants' motion is granted.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff was referred by her doctor to undergo an echocardiography, or treadmill stress test, at defendants' facility, to evaluate her symptoms of shortness of breath. NYSCEF Doc. No. 51, Defendants' exhibit J at 5. On March 26, 2014, plaintiff signed a consent form authorizing Dr. Robert Kornberg, or the assistants of his choice, to perform the test. Plaintiff acknowledged by her signature that she understood the nature of the test and its risks. *Id.* at 4. Plaintiff, who was 76 at the time, fell on the treadmill after it started to move. The "Stress Echo Report" completed by Kornberg, indicated that "[s]econds into start of exercise/treadmill portion of test,

[1] By stipulation dated April 29, 2016, the action was discontinued as against defendants United Medical Practice Associates, P.C. d/b/a United Medical Practice Associates – Cardiology and Mount Sinai Doctors Faculty Practice. *See* NYSCEF Doc. No. 7.

patient lost footing and fell forward onto R arm on treadmill, test aborted. Occurrence report completed." *Id.* at 9.

Elizabeth Veneskey, one of the two health care professionals working with plaintiff at the time of her accident, prepared an occurrence reporting form shortly afterwards. The form summarized the incident as follows: "Patient states she can walk on treadmill and has done same test in past. NP observed patient walk independently into office . . . . As soon as treadmill machine started – with NP at side and echo tech behind her for safety – patient immediately fell forward onto treadmill and treadmill immediately stopped." NYSCEF Doc. No. 55, Defendants' exhibit N at 2.

The amended complaint alleges that defendants "operated a medical practice and held itself out to the public as being competent, experienced and specialized in the business of cardiac testing." NYSCEF Doc. No. 8, amended verified complaint, ¶ 12. It continues that defendants provided cardiac testing to plaintiff and that defendants "negligently and careless caused the plaintiff to sustain grievous and permanent injury." *Id.*, ¶ 14. There were no specific causes of action or any further details.

The verified bill of particulars states that defendants and their employees were negligent in rendering adequate and proper care and treatment and that they "failed and neglected to exercise that degree of care, prudence and skill required of medical facilities, physicians and nurses in the community. . . ." NYSCEF Doc. No. 45, Defendants' exhibit D, verified bill of particulars, ¶ ¶ 2-4. It also indicates that defendants failed to implement appropriate procedures for the prevention of falls and that they failed to supervise and monitor plaintiff during the stress test. Further, defendants allegedly failed to recognize and properly treat plaintiff after she had been injured. Among other allegations, including a theory of res ipsa loquitor, the verified bill of particulars sets forth that defendants failed to properly train and supervise employees who engaged in the care of patients with walking difficulties. These unsupervised employees allegedly left "plaintiff unattended during the course of her stress test," and failed to take a fall risk assessment of plaintiff. *Id.* Plaintiff states that, because of her fall, she dislocated her right shoulder, fractured her humerus and sustained other permanent injuries, including, but not limited to, "left shoulder derangement due to overuse." *Id.*, Second supplemental verified bill of particulars, ¶ 20.

Defendants' Motion

Defendants maintain that there were no accepted departures in the care and treatment rendered by defendants to plaintiff and that none of plaintiff's injuries were caused by any malpractice on their part. In support of their contentions, defendants submit the affirmation of Edward Katz, M.D. (Dr. Katz), a practicing cardiologist/internist. NYSCEF Doc. No. 42, Defendants' exhibit A, Katz affirmation. Dr. Katz states that plaintiff was appropriately referred to defendants "to assess her cardiac risk factors." *Id.*, ¶ 7. Defendants had a policy in place to "insure that all patients are carefully screened for the appropriateness of" stress testing. NYSCEF Doc. No. 54, Defendants' exhibit M, St. Luke's-Roosevelt Hospital Center Echocardiography Department Policy and Procedure at 1. Plaintiff had been screened and there were no contraindications to performing the test.

Defendants also had a policy in place to monitor stress testing, "to insure the safety of the patients for the duration of the stress procedure." NYSCEF Doc. No. 53, Defendants' exhibit L, Monitoring Policy for Stress Testing at 1. Dr. Katz advises that defendants complied with this policy during the stress test. Veneskey, a nurse practitioner, and Anna Kloska, an echocardiogram technologist, were monitoring plaintiff throughout the test.

Dr. Katz cited Veneskey's testimony that she observed plaintiff being able to walk independently into the office and step on the treadmill. Plaintiff advised Veneskey that she had a stress test in the past, so she was familiar with the process. Veneskey explained the process to plaintiff again and then demonstrated what plaintiff should expect during the test. Dr. Katz states, "[h]aving taken the same stress test previously, plaintiff was familiar with both the nature of the test and how the treadmill machine worked." *Id.*, ¶ 16.

Dr. Katz then recounted that plaintiff was told to stand on the treadmill and hold onto the bar. Venesky testified that, before the treadmill starts to move, she always tells patients to stand in the middle of the treadmill, so that they can hold onto the bar and keep their bodies aligned. She testified that she also demonstrated that they must step forward immediately after the treadmill starts and keep stepping forward because the belt will move. The patients are further advised to hold onto the bar the entire time. Veneskey then counts down from 3, 2, 1, and then the treadmill immediately starts to slowly move. Dr. Katz states that "[e]ach of these acts were within good and accepted medical practice." *Id.*, ¶ 18.

The stress test given by defendants utilized the "Bruce Protocol, the most commonly used protocol for most routine exercise stress testing. . . . The initial state of the Bruce protocol involves a slow treadmill speed of 1.7 mph at an incline of 10 percent." *Id.*, ¶ 14. The Bruce Protocol, including the treadmill speed, had already been programmed into the computer. After taking the patient's vital signs and advising that the treadmill would begin moving, Veneskey would start the stress test by pressing the start button on the keyboard. Dr. Katz concludes, "[t]he machine would start immediately thereafter and the test would continue until such time as the patient reaches her exercise tolerance or the protocol completion. In my opinion this is within the standard of care." *Id.*, ¶ 15.

Veneskey was positioned on the left of plaintiff and Kloska was positioned behind plaintiff. After being instructed that the treadmill was about to start by a countdown, plaintiff did not start walking when the machine started. Instead, she tripped on her own feet and fell forward onto the treadmill.

Dr. Katz states, in relevant part:

> "Within seconds into the start of the treadmill portion of the test, although appropriately supervised by two individuals . . . . and instructed that the treadmill was about to start by a 'countdown,' the plaintiff did not begin walking, tripped on her own feet and fell. It is my opinion within reasonable degree of medical certainty the plaintiff's instruction and supervision during this test were wholly appropriate. Moreover, the plaintiff tripping over her own feet was not caused by any negligence or departure by the defendants."

Id., ¶ 20.

According to Dr. Katz, "[i]mmediately after the fall, the defendants took expeditious and appropriate measures by sending the plaintiff to the emergency room for an X-ray, pain control and further management." *Id.*, ¶ 21. Furthermore, Dr. Katz notes that the treadmill "had not yet even accelerated to the slow speed of 1.7 mph, which is the maximum speed of the initial stage of the Bruce protocol." *Id.*, ¶ 22.

Dr. Katz notes that the treadmill was "in good working order." *Id.*, ¶ 24. The treadmill maintenance records do not indicate any operational problems. NYSCEF Doc. No. 56, Defendants' exhibit O. Kloska testified that the treadmill was still being used by defendants and that it did not have any operational issues before or after plaintiff's incident. Dr. Katz concluded with the following:

> "Based on the foregoing, there is no evidence in the medical records or deposition testimony to support any of the plaintiff's claims in the Bill of Particulars that defendants, failed to properly monitor plaintiff and implement necessary measures to prevent her from falling during a stress test. It is my opinion, within a reasonable degree of medical certainty that the care and treatment rendered by defendants was at all times correct and appropriate and within the standards of good and accepted medical practice. The machine was in good working order, the stress test was indicated and properly initiated with appropriate supervision. Despite the same plaintiff fell simply because she did not start walking on the treadmill as instructed when the test was commenced. The response to the plaintiff's fall was immediate, thorough and reflective of good and accepted care."

Id., ¶ 24.

Defendants further point to plaintiff, Venesky and Kloska's testimony, to support their argument that plaintiff's accident was due to her own accidental fall, not due to any medical malpractice. Plaintiff testified that she was never left unsupervised during the test, that she was told to stand on the treadmill and hold the bar, which she did, and that, prior to the start of the test, she was advised that the treadmill was going to start. In addition, Venesky testified that plaintiff was "holding on, the treadmill starts going, and she seemed to misstep. And so she was still holding on, and after she misstepped her legs start going back, she let go, and she went down. . . . She just seemed to misstep immediately." NYSCEF Doc. No. 47, Defendants' exhibit F, Veneskey tr at 43.

Kloska testified that she was an "arm's length away," and that she never leaves the patient alone, "even for a second, especially during the test." NYSCEF Doc. No. 60, Defendants' exhibit G, Kloska tr at 30. Kloska further testified that Veneskey asked the patient if she was ready, if she understood the procedure and "asked the patient to start walking as soon as the treadmill starts. When the treadmill started, a second or a couple of seconds after it started, the patient lost footing. She just fell right away on her shoulder and the treadmill was stopped immediately." *Id.* at 38.

Plaintiff testified that she advised Kloska or Veneskey that she was capable of taking the stress test as she had taken one in the past. She further testified that she was told to stand on the machine and hold onto the bar in front of her. After plaintiff put her hands on the bar, one of the

two employees "went around and put the machine on and, you know, the machine started. It took me by surprise and it pulled me back so I couldn't hold on, so I started screaming stop it, stop it, you know. But I just, I just couldn't hold onto it . . . ." NYSCEF Doc. No. 59, Plaintiff's exhibit 1, plaintiff's tr at 66-67.

Plaintiff testified that when she initially stepped on the machine it was not moving. Plaintiff was then asked if she remembered one of the employees "saying that she's going to be starting the machine," to which plaintiff responded, "Yeah, she said she was going to put it on but, you know, but when it started, it took me by surprise. So, when that started to pull me back." *Id.* at 77-78. Plaintiff continued that she did not start to walk when the machine started. Plaintiff testified, "No, I couldn't [walk], you now, because it was going so fast, that I couldn't - - hold on. I couldn't hold on and I just fell." *Id.* at 78. Plaintiff continued that she did not trip on anything and that there was nothing in her way. She testified that it was just that the treadmill started to move. "Yeah, it started moving." *Id.* To which plaintiff was then asked, "[a]fter she told you that it was going to start?" and plaintiff testified "Yeah. It took me by surprise. I was holding on. When it started, I couldn't hold on . . . . So I fell, you know, on my arm." *Id.* at 78-79. Plaintiff continued that the employee stopped the machine right away.

In sum, defendants argue that there was no deviation from the accepted standard of care and that plaintiff simply stumbled on her own feet because she did not start walking on the treadmill, despite being warned that it was going to start moving.

In opposition, plaintiff alleges that a question of fact remains as to whether defendants created a falling hazard. Plaintiff testified that she was familiar with the stress test, as this was not first one she had taken. However, the treadmill was started without a warning, so plaintiff was not ready and fell. Plaintiff notes the following testimony where she testified "yeah, she said she was going to put it on but, when it started it took me by surprise." Plaintiff's tr at 78. Plaintiff argues that defendants' motion should be denied, as they failed to submit evidence that they did not cause the fall by creating a dangerous condition by starting the treadmill.

Plaintiff further claims that defendants were negligent in starting the treadmill "too quickly." NYSCEF Doc. No. 58, Oliva affirmation, ¶ 7. According to plaintiff, although defendants claimed to be following a certain start up protocol, plaintiff's testimony raises a question of fact as to whether it was started too quickly. Plaintiff testified that she was unable to hold onto the treadmill because it had been going "so fast." Plaintiff's tr at 78.

Plaintiff alleges that this is an action sounding negligence, summarizing, "it is a question of fact, and specifically of credibility . . . whether the manner and speed at which treadmill [sic] constituted a dangerous condition. Second, the defendants have not demonstrated, prima facie, that they did not have actual nor [sic] constructive notice of the danger posed by starting the treadmill at the speed they did on the date in question." *Id.*, ¶ 8. Plaintiff contends that she served a summons and complaint with causes of action sounding in negligence, and not medical malpractice. Plaintiff maintains that defendants neither served nor demanded a certificate of merit. Further, according to plaintiff, defendants' submission of a physician's affidavit is "of no consequence." *Id.*, ¶ 14.

In brief, defendants reply that the matter sounds in medical malpractice, not negligence. Among other things, they state that plaintiff's complaint alleges that she was injured during the course of a medical procedure. Further, defendants attach the notice to produce certificate of merit which was filed at the same time as their answer.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

As set forth below, plaintiff has failed to submit evidentiary facts or materials to rebut the defendants' prima facie showing, and therefore, has not demonstrated the existence of a triable issue of fact. *See Carrera v Mount Sinai Hospital*, 294 AD2d 154, 154-155 (1st Dept 2002).

II. Medical Malpractice

"[A] claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 (1996) (internal quotation marks and citation omitted); *see also Speigel v Goldfarb*, 66 AD3d 873, 874 (2d Dept 2009) (internal quotation marks and citation omitted) ("More specifically, an alleged negligent act constitutes medical malpractice when it can be characterized as a crucial element of diagnosis and treatment and an integral part of the process of rendering medical treatment to the plaintiff").

In a recent decision, the Appellate Division, Second Department found that an action sounded in medical malpractice, not ordinary negligence, when plaintiff allegedly sustained injuries when she was thrown off a treadmill and injured during a physical therapy session. *See Cohen v Lebgutt Realty. LLC*, 158 AD3d 740, 741 (2d Dept 2018). "Because the plaintiff challenged [...] assessment of the plaintiff's supervisory needs during her physical therapy session, the conduct at issue derived from the duty owed to the plaintiff as a result of the physical therapist-patient relationship and was substantially related to her medical treatment." *Id.* at 741.

In the instant situation, plaintiff's claims based on defendants' conduct during the stress test are grounded in medical malpractice. As plaintiff was referred to have the stress test for the purpose of evaluating her claims of fatigue, the test was a "crucial element of diagnosis and treatment." *Speigel v Goldfarb*, 66 AD3d at 874 (internal quotation marks and citation omitted). The stress test was then administered in accordance with certain medical policies and procedures,

including the Bruce Protocol, and was performed by two trained health care professionals. Accordingly, defendants' challenged conduct in supervising and monitoring plaintiff during the course of performing the stress test sounds in medical malpractice, as it occurred during the course of rendering medical treatment. *See also Lang-Salgado v Mount Sinai Med. Ctr., Inc.*, 2016 NY Slip Op 30615[U], *2 (Sup Ct, NY County 2016), *affd* 157 AD3d 532 (1st Dept 2018) (Claim sounded in medical malpractice when plaintiff alleged an x-ray technician was negligent in positioning plaintiff, causing her to fall off the stretcher, because plaintiff "does not claim that the condition or usage of defendant's table or premises caused her injury. . . . [but] the defendant's challenged conduct is linked to the medical treatment of this particular patient . . . ."). Further plaintiff's additional claims for failing to follow proper rules or protocols, also "implicates questions of medical competence or judgment linked to the treatment of plaintiff and sounds in medical malpractice." *Lang-Salgado v Mount Sinai Med. Ctr., Inc.*, 157 AD3d at 533.

The court notes that plaintiff's allegations regarding pleading a negligence, not medical malpractice, action, are disingenuous and belied by the record. To begin, plaintiff marked medical malpractice action on her note of issue filed on March 26, 2018. NYSCEF Doc. No. 33, Defendants' exhibit H at 1. The plaintiff's bill of particulars alleges that defendants were negligent by failing to exercise the degree of care and skill required of medical facilities, physicians and nurses in the community. It was further alleged that defendants failed to supervise and monitor plaintiff during her stress test. Moreover, the record indicates that defendants filed their notice to produce a certificate of merit.

To sustain a cause of action to recover damages for medical malpractice, a plaintiff must establish:

> "a deviation or departure from accepted practice and that such departure was a proximate cause of the plaintiff's injury. Thus, on a motion for partial summary judgment, the movant has the initial burden of establishing the absence of any departure from good and accepted practice, or that the plaintiff was not injured by any departure."

Suits v Wyckoff Hgts. Med. Ctr., 84 AD3d 487, 488 (1st Dept 2011) (internal citations omitted).

Defendants' submissions, including medical records, testimony and an expert affirmation, have established a prima facie defense to this medical malpractice action. The submissions demonstrated, prima facie, that defendants did not deviate from acceptable standards of medical care in their conduct with plaintiff and that their conduct was not the proximate cause of plaintiff's injuries. *See e.g. Biondi v Behrman*, 149 AD3d 562, 563 (1st Dept 2017) ("Defendants met their prima facie burden in their summary judgment motion with plaintiff's medical records and the opinions of [experts], who addressed all theories of negligence alleged in the bill of particulars").

The expert reviewed defendants' acts in connection with administering the stress test and explained how defendants did not depart from good and accepted medical practice. The health care professionals involved followed defendants' procedures and policies in place prior to, and during, the stress test. Plaintiff was observed being able to walk independently, with a steady gait. She stated that she was comfortable taking the test, as she had taken the test before and was

familiar with the procedure. Defendants positioned plaintiff on the non-moving treadmill, advised her what to expect and demonstrated how she should position herself and how she should start walking when the treadmill starts to move. Defendants stated that they warned plaintiff that the machine was about to start and then the treadmill slowly started to move. However, plaintiff did not start to immediately walk when the treadmill moved and then tripped and fell over her own feet.

The expert continued that defendants monitored plaintiff the entire time during her test and immediately assisted plaintiff after her fall. The treadmill was preprogrammed with the Bruce Protocol, the most commonly used protocol for stress testing. The treadmill started with the protocol when Veneskey pushed a button. Finally, the treadmill did not have any maintenance problems.

"Once the defendants met their burden for summary judgment, plaintiff was obligated to rebut defendants' prima facie showing with medical evidence demonstrating that the defendants departed from accepted medical practice." *Biondi v Behrman*, 149 AD3d 562, 563 (1st Dept 2017). In the instant situation, plaintiff failed to raise a triable issue of fact because she did not submit any medical evidence in opposition to defendants' prima facie showing and expert's opinion. *See e.g. Cohen v Lebgutt Realty, LLC*, 158 AD3d at 741 (internal citations omitted) ("[Physical therapist] demonstrated, prima facie through the submission of an expert affidavit, that accepting the plaintiff's version of events as true she did not depart from the accepted standard of care for physical therapy. In opposition, the plaintiff failed to raise a triable issue of fact, as she did not submit an expert affidavit").

Here, plaintiff argued that, while undergoing a stress test, defendants negligently monitored and supervised her. Now, in reply to defendants' motion, she claims that the action sounds in negligence, as defendants created a falling hazard by starting the treadmill allegedly without warning and at a fast pace.[2] Prior to this reply, plaintiff had not made any allegations that her injuries stemmed from the condition of the treadmill. "It is axiomatic that a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers." *Biondi v Behrman*, 149 AD3d at 563-564. Therefore, as "[p]laintiff's new theory of malpractice is not related to the claims in the pleadings," the court will not consider it. *Id.* at 564; *see also Keilany B. v City of New York*, 122 AD3d 424, 425 (1st Dept 2014) ("The merits of plaintiffs' new theory of recovery, raised for the first time in opposition to [defendant's] motion for summary judgment, will not be considered").

Moreover, plaintiff's alternative argument that credibility questions remain, is unavailing. Defendants testified that whenever a patient is given a stress test, she is informed that a countdown will begin and then the test will start. Contrary to plaintiff's contention, as set forth in the facts, plaintiff testified and conceded numerous times that she was given a warning prior to

[2] "As movants for summary judgment, defendants must submit prima facie proof demonstrating that they neither created nor had notice of a dangerous condition presented by the *spa door*." Oliva affirmation, ¶ 21, emphasis added. The court notes that this is one of numerous careless errors made in the plaintiff's papers.

the start of the treadmill. It is irrelevant that plaintiff claims to be taken by surprise when the treadmill actually started to move.

Furthermore, plaintiff alleges that the treadmill was moving too quickly. In support of the motion for summary judgment, defendants stated that the treadmill was preprogrammed with the Bruce Protocol and, at the time of plaintiff's fall, the initial 1.7 mph stage of the Bruce Protocol had not yet been reached. In addition, the treadmill did not have any maintenance problems and was functioning properly before and after plaintiff's accident. In opposition, given that she had taken a stress test in the past, plaintiff felt that the treadmill was moving too quickly. However, plaintiff's theory that the treadmill was moving too fast or somehow not operating properly is speculative and cannot defeat summary judgment. *See e.g. Concepcion v City of New York*, 139 AD3d 606, 607 (1st Dept 2016) ("opinions on . . . causation are speculative and unsupported by the record").

In conclusion, defendants' motion for summary judgment is granted.

CONCLUSION

Accordingly, it is

ORDERED that defendants The St. Luke's-Roosevelt Hospital Center d/b/a Mount Sinai St. Luke's and Mount Sinai West's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendants must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

10/5/18
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE