Galbo v New York City Health and Hosps. Corp.
2019 NY Slip Op 30409(U)
February 21, 2019
Supreme Court, New York County
Docket Number: 450042/2013
Judge: George J. Silver
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Index №. 450042/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

---X

JOSEPH GALBO **Index №. 450042/2013**

Plaintiff

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Defendant

---X

HON. GEORGE J. SILVER:

In this medical malpractice action, defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC") moves for summary judgment and an order dismissing plaintiff JOSEPH GALBO's ("plaintiff") complaint as against it. Plaintiffs opposes NYCHHC's application.

BACKGROUND

This lawsuit derives its origins from a work-related accident that plaintiff suffered on May 26, 2011 when he got his right hand caught between an elevator cable and pulley while performing repair work. Indeed, plaintiff has testified that while he was cleaning an elevator at approximately 12:45 PM on that date, his right hand got caught in the wheel that turns the elevator cable. After the machine released plaintiff's hand, plaintiff noticed that his ring finger was lacerated at the proximal interphalangeal joint ("PIP") and had fallen into his latex glove, and his pinky finger was lacerated over the PIP joint with an oblique tip amputation that included the nail bed. In addition, plaintiff had severe lacerations to his middle finger and lost mobility in his wrist. Following the accident, Emergency Medical Services ("EMS") received a call between 12:54 P.M. and 12:55 P.M., and arrived on scene between 12:55 P.M. and 12:59 P.M. Plaintiff testified that the two EMTs who arrived on scene cut off plaintiff's latex glove, kept the pinky ringer in place and wrapped his entire hand with gauze. They also placed the amputated part of the ring finger into a Ziploc bag with ice.

Plaintiff was then taken from Brooklyn to Bellevue Hospital Center in Manhattan ("Bellevue"), after allegedly being told by the EMTs that it is "the best trauma hospital in the east coast." Plaintiff arrived at Bellevue between 1:40 P.M. and 1:46 P.M. Once there, plaintiff testified that he was given a shot of morphine by a nurse. Plaintiff subsequently described a five-hour delay between his shot and the time that he was taken for an x-ray. Plaintiff also testified that an additional hour elapsed before he was finally treated by a doctor.

Contrary to plaintiff's testimony, his medical records reveal that after the initial set of vital signs were taken at 1:46 p.m., minutes after his arrival, a nurse noted that plaintiff was seen by a hand doctor, Theodore Woo, M.D. ("Dr Woo"), and that an x-ray was subsequently ordered at 1:47 P.M. Approximately 1 ½ hours after plaintiff's arrival at Bellevue, the x-rays of his right hand as well as its ring finger and pinky finger were performed. The x-rays demonstrated marked soft swelling of the hand, a laceration of his distal fifth digit with a comminuted transverse fracture of the distal tuft with palmar displacement of the amputated segment, and amputation of the distal fourth digit of the distal tuft. Thereafter, after consulting with Dr. Woo, suturing of plaintiff's hand was performed as early as 6:45 P.M. In fact, at 7:40 P.M., an incoming nurse noted that a physician was at plaintiff's bedside with laceration repair already in progress. At 10:05 pm, it is noted that plaintiff was discharged with his right hand bandaged.

During the suturing, plaintiff claims that he handed Dr. Woo the Ziploc bag containing his ring finger, which was placed on the table next to the utensils. According to plaintiff, Dr. Woo then unwrapped the bandage from plaintiff's hand and began reconnecting the amputated portion of his pinky finger using stitches, a process that took about thirty (30) minutes. Plaintiff alleges that while the nurse was cleaning the blood-soaked gauzes from the table nearby, she accidentally threw away everything into the trauma bin, which allegedly included the Ziploc bag with the amputated tip of the ring finger. Dr. Woo testified that he had no recollection of such an event.

Dr. Woo has further testified that he spoke to the hand surgery fellow in the operating room, whereupon the case was discussed and x-rays were reviewed, and that the fellow concluded that the fingertip of the ring finger was not re-implantable. Indeed, according to Dr. Woo, it was concluded that the tip was not re-implantable because the distal tip where plaintiff's amputation occurred did not have enough vasculature to warrant consideration of reattachment.

Thereafter, plaintiff testified that Dr. Woo continued stitching for the next 1 ½ hours, working on the ring finger, as well as the lacerations on his middle finger, index finger and the dorsum of the right hand. He then wrapped the ring and pinky fingers separately with gauze and thereafter wrapped the entire hand with bandage. Plaintiff was instructed to return for a wound check appointment on May 31, 2011 in urgent care and then to the hand surgery clinic for a follow-up visit on June 3, 2011. Prior to discharge, plaintiff was instructed not to get the area wet and to change the bandage as needed, and was discharged with a prescription for Percocet. Plaintiff did not return for his May 3, 2011 wound check-up and did not return for his follow-up visit to the hand surgery clinic on June 3, 2011.

Following his discharge, plaintiff testified that he experienced severe pain during the overnight hours, which prompted him to go to the Staten Island University Hospital ("SIUH") sometime before noon the next day, May 27, 2011. He went on to claim that he was basically turned away from SIUH without anyone looking at his hand, and was advised to return to Bellevue because they were "not allowed to touch what another hospital did." Plaintiff changed the dressing once a day, but the gauze (placed at Bellevue) which covered his ring and pinky fingers remained in place. Four days later, on May 31, 2011, he presented to a private plastic surgeon, "Dr. Patel," who by plaintiff's account, did nothing for him other than sending him

for physical therapy "next door." Plaintiff stated that he never returned to Dr. Patel and admitted that he never sought the therapy next door, and that he merely walked in and subsequently walked out.

Plaintiff went to see another hand surgeon, Vincent Ruggiero, M.D. ("Dr. Ruggiero") on June 7, 2011 and went on to undergo four surgeries to his ring and pinky fingers beginning July 19, 2011, all performed by Dr. Ruggiero at SIUH.

ARGUMENTS

In support of its instant motion for summary judgment, NYCHHC annexes the affirmation of Robert Pae, M.D. ("Dr. Pae"), a physician board certified in orthopedic surgery with a certificate of added qualification in hand surgery, who opines that NYCHHC's actions were consistent with the appropriate standard of care for hand surgery. Specifically, Dr. Pae states that plaintiff was never a candidate for re-implantation of the ring finger, and that the semi-attached pinky finger was appropriately treated by Dr. Woo. Dr. Pae points out that any delay in treatment did not occur while plaintiff was at Bellevue on the date of the injury, but rather is attributable to plaintiff's subsequent failure to return to Bellevue for his wound check appointment on May 31, 2011 in urgent care or for his June 3, 2011 follow-up appointment in the hand surgery clinic. Had plaintiff attended those appointments, Dr. Pae opines that plaintiff could have been evaluated for any necessary revisions at either of those visits. Instead, he presented to Dr. Ruggiero on June 7, 2011 and it was not until July 19, 2011 that he underwent his first revision surgery performed by Dr. Ruggiero.

Regarding plaintiff's ring finger, Dr. Pae affirms that plaintiff's hand x-ray on May 26, 2011 confirmed that plaintiff lost the distal tip of the ring finger, halfway from the joint to the tip, at the start of the nail bed. Dr. Pae further explains that this is the level where hand surgeons are taught to "leave it off unless there is a compelling reason." He further emphasizes that hand surgeons are taught that for all fingers but the thumb, anything above the joint, especially at the "white of nail" and up, should be discarded. Dr. Pae states that the reasoning behind this has to do with the high failure rate of such re-attachments, since it is incredibly hard to operate at this level to reattach the many tiny blood vessels in the area, and the fact that reattachment at this level does not add much in the way of function. Dr. Pae further states that when determining whether to replant an amputated finger, surgeons will consider length (grasp), tendon (grip strength), and the number of fingers remaining. Dr. Pae further opines that the fact that the initial trauma was a crush-type injury rather than a clean guillotine-type injury also was a determinative factor in re-implantation not being a viable consideration. Moreover, Dr. Pae highlights that NYCHHC was dealing with the ring and pinky fingers, which are considered less functionally significant than the other fingers. Dr. Pae also states that the timing of the treatment only matters if the patient is to be taken to the operating room for reattachment. In plaintiff's case, Dr. Pae states that a reasonably prudent hand surgeon acting in conformance with applicable standards of care would not have taken plaintiff to the operating room "under any circumstances." Dr. Pae further opines, within a reasonable degree of medical certainty, that there was no delay in treatment at Bellevue, and that any purported delay had absolutely no causative impact whatsoever on plaintiff's outcome.

Moreover, Dr. Pae opines that Dr. Woo appropriately performed debridement and closure of the ring finger with chromic gut (dissolvable suture), which Dr. Pae states is exactly what he would have done in that situation. In addition, Dr. Pae states that when performing subsequent surgeries, Dr. Ruggerio went out of his way to try to preserve plaintiff's ring finger length, and could have avoided additional procedures had he just amputated to the eventual level of the joint during the first surgery.

Dr. Pae contrasts plaintiff's ringer finger with his pinky finger, opining that the latter was initially salvageable because it was not intended for "re-implantation" as there was no blood vessel reattachment. Dr. Pae further opines that plaintiff's subsequent pinky finger rescissions were occasioned by plaintiff's lack of healing, not because of any negligence on NYCHHC's part. As such, Dr. Pae states that plaintiff's pinky finger treatment was entirely in accordance with the applicable standard of care. Finally, regarding plaintiff's middle finger, Dr. Pae notes that over two years following the initial injury, beginning mid-2013, Dr. Ruggiero's records describe an "excoriation process" of the middle finger, which can be described as a bum/skin breakdown. While plaintiff at his deposition described this process as a sequelae of the initial injury relating to some type of infection or wound breakdown, Dr. Pae explains that this chronic process has nothing to do with the plaintiff's elevator injury or subsequent hand treatment, and more to do with plaintiff's inability to heal appropriately.

Based on the medical records, deposition testimony, and Dr. Pae's expert affirmation, NYCHHC submits that its treatment was entirely in accordance with the applicable standard of care and that no purported deviation or departure therefrom either caused or contributed to the injuries alleged to have been sustained by plaintiff. As such, NYCHHC submits that judgment in its favor is warranted.

In opposition, plaintiff states that several issues should prevent this court from issuing a finding in favor of NYCHHC's application. First, plaintiff contends that the suturing of plaintiff's pinky finger, and discarding of part of plaintiff's right finger were not in accordance with applicable standards of care. Plaintiff states that Dr. Woo never consulted with an orthopedic hand surgeon or orthopedist after evaluating plaintiff's injuries or before suturing back the distal tip of plaintiff's pinky finger. To be sure, plaintiff highlights that Dr. Woo sutured the fingertip of plaintiff's pinky, and threw away the fingertip of plaintiff's ring finger before consulting with a "fellow" or "chief." Moreover, plaintiff notes that neither the name of the "fellow" or "chief" in question nor the way plaintiff's ring finger was discarded are noted in plaintiff's chart. As remarkable as these events were, plaintiff finds it odd and likely in contravention of applicable standards of care that neither is noted on plaintiff's chart. Plaintiff further states that Dr. Woo's failure to advise plaintiff of the risks associated with suturing was also a deviation from applicable standards of care. Plaintiff further argues that the treatment that he received at Bellevue, specifically the way his fingertip of his right ring finger was discarded and the delay in treatment when reattaching his amputated pinky, had a major impact on plaintiff's emotional health. Indeed, plaintiff annexes the affidavit of Diane T. Berger, a psychotherapist, who opines that plaintiff suffers from post-traumatic stress disorder ("PTSD"), depression and anxiety in major part due to the treatment he received at Bellevue. Plaintiff also annexes the expert affirmation of David Mark Nidorf ("Dr. Nidorf"), an emergency medicine doctor, who opines that the careless disposal of plaintiff's ring finger, delay in attending to plaintiff's medical needs, failures of Dr. Woo

to consult an orthopedic hand surgeon or inform plaintiff of the risks of suturing, were deviations of accepted medical practice and a proximate cause of plaintiff's injuries.

In reply, NYCHHC challenges plaintiff's expert affirmation and the conclusions drawn therefrom. To be sure, NYCHHC argues that plaintiff failed to submit qualified expert testimony capable of proving a deviation from accepted standards of medical care in the field of orthopedic hand surgery. Indeed, NYCHHC submits that plaintiff's expert, Dr. Nidorf, is an emergency medicine doctor with absolutely no background or experience in the field of orthopedic hand surgery, or any orthopedic surgery whatsoever. Accordingly, NYCHHC contends that Dr. Nidorf is incapable of establishing a deviation from the "community standard of practice," which plaintiff acknowledges is necessary to defeat NYCHHC's motion for summary judgment. Second, NYCHHC avers that Dr. Nidorf attempts to impose a duty of care upon the Bellevue and Dr. Woo that does not exist under the law. Indeed, NYCHHC argues that Dr. Nidorf's conclusions regarding Dr. Woo's purported departures are wholly speculative and based on facts not supported by the evidence. NYCHHC therefore submits that Dr. Nidorf's affirmation is incapable of defeating summary judgment, and must be disregarded by this court. NYCHHC further reiterates the arguments made in its moving papers, and renews its argument that it is entitled to judgment in its favor.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v.*

Lawrence Hosp., 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

Here, movants' submission of deposition transcripts, medical records and an expert affirmation based upon the same established a prima facie defense entitling them the summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Pae specifically provided that there was no issue with the timing of treatment or the fact that treatment was rendered in the emergency suture room by Dr. Woo during his rotation in the hand surgery service, upon consultation with the hand surgery fellow, as noted in the chart. Dr. Pae further opines that plaintiff was never a candidate for re-implantation, and therefore, the allegation of the lost ring fingertip, even if true, is simply a red herring as the ring fingertip never would have been reattached. As such, Dr. Pae concludes that the loss of that distal portion of the ring fingertip had no impact on plaintiff's care, and for all intents and purposes, is irrelevant to this case.

Additionally, Dr. Pae opines that the treatment of the pinky finger was also in accordance with the standard of care as it was not, and was never intended to be, a re-implantation, as evidenced by the fact that there was no reattachment of severed vasculature. To be sure, Dr. Pae notes that plaintiff's pinky was simply re-sutured so that the resulting necrosis, a wholly expected and anticipated finding, could naturally declare itself. Indeed, re-suturing the pinky fingertip was a purposeful measure intended to preserve as much of the finger's length as possible.

Lastly, Dr. Pae concludes that the reason for plaintiff's eventual stormy medical course was unrelated to the care rendered at Bellevue, but rather, the degree of the initial soft tissue injury from the elevator accident and patient's inability to heal.

In opposition to NYCHHC's prima facie showing, plaintiff raises triable issues of fact to preclude summary judgment. As an initial matter, although Dr. Nidorf, who practices in family medicine and emergency room medicine, is not an orthopedic surgeon, he has been a board-certified physician since 1993, and works in a hospital that has over 65,000 annual patient visits. Working in an emergency room setting, Dr. Nidorf has observed numerous admissions such as plaintiff's admission at Bellevue in the instant lawsuit, and therefore can opine within a reasonable degree of medical certainty whether NYCHHC's medical intervention was at all times appropriate, and in accordance with accepted standards of care. To be sure, Dr.

Nidorf's credentials do not place him within the ambit of medical professionals devoid of the requisite knowledge or experience to render an opinion outside of their discipline (*see Atkins v Beth Israel Health Servs*., 133 AD3d 491 [1st Dept 2015]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]). Indeed, a medical expert need not be a specialist in a particular field in order to testify regarding accepted practice in that field (*Lopez v Gramuglia*, 133 AD3d 424 [1st Dept 2015]) so long as that medical expert provides a foundation that he or she possesses the requisite knowledge necessary to make a determination on the issues presented (*Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]). Once such a foundation is laid, the issue of the expert's qualifications to render such an opinion is a question of weight for a jury resolve. Here, Dr. Nidorf's curriculum vitae ("cv") notes his extensive experience in emergency room settings such as the setting that plaintiff presented to in the instant matter. Moreover, as an emergency room physician and practitioner of family medicine, Dr. Nidorf has experience with suturing lacerations and performing minor surgical procedures. As such, it is axiomatic that he has provided a requisite foundation for his opinions.

Having laid the appropriate foundation, the court next turns to the factual issues raised by plaintiff. In contrast to Dr. Pae's affirmation, Dr. Nidorf opines that discarding plaintiff's ring fingertip was a deviation of care. That opinion is supported by the affidavit of Diane T. Berger, a psychotherapist, who opines that plaintiff suffers from PTSD, depression and anxiety in major part due to the treatment he received at Bellevue. The fact that Dr. Nidorf's affirmation diverges from Dr. Pae's affirmation on the issue of whether plaintiff's ring fingertip could have been salvaged rather than being discarded in plaintiff's presence raises a credibility issue that ultimately must be decided by a jury. To be sure, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*).

Moreover, as plaintiff highlights, an issue of fact is also raised regarding the viability of plaintiff's ring fingertip by way of Dr. Woo's testimony that he discussed the condition of plaintiff's ring finger with a hand surgery fellow in the operating room, and subsequently concluded that the fingertip was not re-implantable. Plaintiff takes issue with this self-serving testimony, arguing that it is contradicted by the medical records in this case, which do not fully account for the content and timing of Dr. Woo's alleged consultation with a hand surgery fellow. Moreover, plaintiff states that Dr. Woo's consultations with a "fellow" rather than an orthopedic hand surgeon or orthopedist were improper. To be sure, plaintiff contends that by not consulting with an appropriate specialist, and by not accounting for the way plaintiff's ring finger was discarded, NYCHHC's actions sharply diverged from appropriate standards of care, and proximately caused plaintiff's injuries. As plaintiff and NYCHHC's opinions on this issue sharply diverge, issues of fact exist regarding whether plaintiff's ring fingertip could have been saved and re-implanted, and whether NYCHHC's actions were appropriate when treating plaintiff's ring finger.

However, plaintiff's expert affirmation does not rebut NYCHHC's prima facie showing with respect to the treatment of plaintiff's pinky finger. To be sure, Dr. Nidorf opines, without support, that Dr. Woo deviated from accepted practice when suturing plaintiff's pinky finger. Ignored in plaintiff's expert's analysis is the notion that Dr. Woo's re-suturing of the pinky fingertip was a purposeful measure intended not to restore the fingertip, but to preserve as much of the finger's remaining length as possible. Dr. Pae

acknowledges any resulting necrosis from the re-suturing of plaintiff's pinky finger was a wholly expected and anticipated finding. Dr. Nidorf ignores this opinion and merely focuses on the likelihood that the reattached portion of his finger would become necrotic, a fact that is undisputed by Dr. Pae. Accordingly, summary judgment is warranted as to NYCHHC's handling of the surgery to plaintiff's pinky finger, as plaintiff has failed to establish that issues of fact exist regarding NYCHHC's treatment of plaintiff's pinky finger, and whether that treatment proximately caused plaintiff's alleged injuries.

As to the middle finger, Dr. Pae notes that over two years following the initial injury, beginning mid-2013, Dr. Ruggiero's records describe an "excoriation process" of the middle finger, which can be described as a burn/skin breakdown. While plaintiff at his deposition described this process as a sequelae of the initial injury relating to some type of infection or wound breakdown, Dr. Pae explains that this chronic process has nothing to do with plaintiff's elevator injury or subsequent hand treatment. Indeed, Dr. Pae would expect plaintiff to have permanent loss of grip and dexterity because of the initial elevator injury. Dr. Pae thinks that plaintiff was an extremely unlucky patient for whom it turned out that the extent of the initial soft tissue injury was far worse than was expected. This is because the patient suffered a severe crush-type injury as opposed to a clean guillotine-type injury. Since the tissues and tendons had been "yanked and pulled," the extent of the injury was not immediately evident. Despite what Dr. Pae describes as good care by Bellevue, followed by good care by the subsequent treating hand surgeon, Dr. Ruggiero, plaintiff's outcome resulted solely from the severity of his initial injury and his being a poor healer. As plaintiff does not adequately dispute these findings, summary judgment is warranted as to NYCHHC's handling of plaintiff's middle finger.

However, issues of fact also exist regarding the timing of plaintiff's treatment while he was in the emergency room. To be sure, Dr. Nidorf, who is equipped with extensive emergency room experience, opines that delays in seeking a surgical consult were a departure from the standard of care, that the viability of plaintiff's severed ring finger diminished with every passing minute, and that re-implantation could have been achieved had the surgery occurred sooner rather than later. Although Dr. Nidorf did not quantify the extent to which NYCHHC's negligence decreased the chance of saving the distal portion of his ring finger, his competing opinion that the delay in treatment diminished plaintiff's chance of a better outcome is sufficient to raise an issue of fact as to proximate cause (*see King v. St. Barnabas Hospital*, 87 AD3d 238 [1st Dept 2011]; *see also Goldberg v. Horowitz*, 73 AD3d 691, 694 [2d Dept 2010]).

Moreover, while NYCHHC highlights that plaintiff's medical chart specifically demonstrates that plaintiff arrived at Bellevue at around 1:40 P.M., was immediately given a shot of morphine, and the initial set of vital signs were taken at 1:46 P.M, issues of fact exist with respect to whether the timing of plaintiff's treatment in its totality was in accordance with applicable standards of care such that NYCHHC could not have proximately caused his injuries. To be sure, it is unclear on this record whether the 1½ hours that elapsed between plaintiff's arrival and the performance of x-rays, or delay in suturing until 6:45 P.M were deviations that proximately caused plaintiff's injuries. Moreover, plaintiff himself describes a five-hour delay between his initial morphine shot upon admission and the time that he was taken for an x-ray. Plaintiff has also testified that an additional hour elapsed thereafter before he was finally treated by a physician. As such, issues of fact exist as to proximate causation given the alleged delay between plaintiff's arrival at

Bellevue and his treatment thereafter. NYCHHC's contention that plaintiff's desire for expediency in his surgical intervention runs athwart to plaintiff's argument that Dr. Woo failed to obtain his informed consent is without merit. To be sure, Dr. Woo could have simultaneously informed plaintiff of the risks of surgery while also attending to the time pressure associated with any surgical intervention that plaintiff consented to. Accordingly, issues of fact exist regarding whether Dr. Woo's failure to obtain plaintiff's informed consent violated the accepted standard of care under the circumstance.

Considering the foregoing, it is hereby

ORDERED that defendant NEW YORK CITY HEALTH AND HOSPITAL CORPORATION'S motion for summary judgment is granted only to the extent that plaintiff's claims premised on NEW YORK CITY HEALTH AND HOSPITAL CORPORATION'S alleged deviations of care proximately causing injury to plaintiff's pinky finger and middle finger are dismissed; and it is further

ORDERED that as issues of fact exist with respect to plaintiff's remaining claims regarding defendants' alleged malpractice in diagnosing, treating and subsequently discarding plaintiff's ring finger, failing to timely aid plaintiff, and failing to obtain plaintiff's informed consent, dismissal of those claims as against NEW YORK CITY HEALTH AND HOSPITAL CORPORATION is denied; and it is further

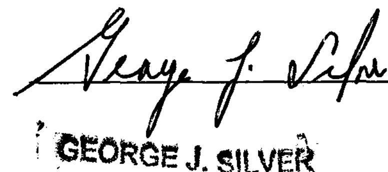
ORDERED that within 20 days of the court's issuance of this order, NEW YORK CITY HEALTH AND HOSPITAL CORPORATION is directed to serve a copy of this order with notice of entry upon plaintiff JOSEPH GALBO; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant NEW YORK CITY HEALTH AND HOSPITAL CORPORATION only as to those claims dismissed by this court's aforementioned directives; and it is further

ORDERED that the parties are directed to appear for a conference before the court on March 19 2019 at 9:30 AM at the courthouse located at 111 Centre Street, Room 1227 (Part 10).

This constitutes the decision and order of the court.

Dated: February 21, 2019



GEORGE J. SILVER