SHORT FORM ORDER ORIGINAL

INDEX No. 619695/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-17-19
SUBMIT DATE 10-10-19
Mot. Seq. # 02 - MG
03 - MG

----------X

KATHLEEN SOKOL,

Plaintiff,

- against -

LYNCAN UNG, D.O., M.D., MICHAEL SLATTERY, M.D., and KIMBERLY LEVY, RPA-C,

Defendants.

----------X

KRENTSEL & GUZMAN, LLP
Attorneys for Plaintiff
17 Battery Place, Suite 604
New York, NY 10004

LEWIS JOHS AVALLONE & AVILES
Attorney for Defendant- UNG
One CA Plaza, Suite 225
Islandia, New York 11749

FUMUSO, KELLY, SWART, FARRELL, POLIN & CHRISTESEN, LLP
Attorney for Defendant- SLATTERY
110 Marcus Blvd., Suite 500
Hauppauge, New York 11788

KERLEY WALSH MATERA & CINQUEMANI, P.C.
Attorney for Defendant- LEVY
2174 Jackson Avenue
Seaford, New York 11783

Upon the following papers numbered 1 to 54 read on this motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 (#02) & 29 - 39 (#03) ; ~~Notice of Cross Motion and supporting papers ____ ;~~ Answering Affidavits and supporting papers 12 - 19 (#02) & 40 - 47 (#03) ; Replying Affidavits and supporting papers 20 - 28 (#02) & 48 - 54 (#03) ; ~~Other ; (and after hearing counsel in support and opposed to the motion) it is,~~

Defendant Lyncan Ung, D.O., M.D., moves for an order granting summary judgment and dismissing the complaint against him. Defendant Kimberly Levy, RPA-C, separately moves for an order granting summary judgment and dismissing the complaint against her. The plaintiff opposes both of these motions arguing that there are issues of fact requiring a trial.

In this medical malpractice action, it is asserted that the defendants negligently departed from good and accepted standards of care and practice when the plaintiff, Kathleen Sokol, came under their care and treatment on or about May 12, 2016 and thereafter. It is asserted that the defendants failed to timely diagnose and treat multiple foot fractures, appreciate the severity of her

complaints, order necessary diagnostic tests and radiological film studies, properly interpret tests and studies taken, order consultation, facilitate wound healing and improperly discharged her.

The plaintiff presented at the emergency department at Brookhaven Memorial Hospital, hereinafter referred to as "BMH", on May 12, 2016, at 2:22pm after reporting that she dropped a patio table on her right foot. Defendant Levy is a Physician's Assistant employed by BMH. Sokol was seen by a triage nurse who noted a small amount of swelling on her foot and given her less urgent presentation she was treated within the Emergency Department's Fast Track by defendant Levy. Defendant Ung was listed as the "attending/supervising physician" but did not see the plaintiff, or speak with defendant Levy, while she was in the Fast Track. Defendant Levy performed an examination of the plaintiff and ordered a foot x-ray to be conducted. At 3:13pm the foot x-ray was performed. Defendant Slattery was the interpreting radiologist who reviewed the x-ray images and authored the report wherein it was indicated that the x-ray was negative for right foot fracture. Defendant Levy reviewed Slattery's report and diagnosed the plaintiff with a contusion. Levy directed the plaintiff to maintain an ace bandage on the foot, utilize anti-inflammatories, use crutches, utilize RICE (rest, ice, compression, elevation), and be weight-bearing as tolerated. Levy also instructed the plaintiff that "if there are any other changes or worsening of symptoms patient is to return to ed". The plaintiff signed her discharge paperwork wherein she was advised to follow-up within 1-2 days with her regular doctor. The plaintiff was discharged at 3:51pm from BMH. On May 14, 2016, defendant Ung signed off on the chart and wrote "patient was seen independently by PA\NP. I reviewed documentation, agree with treatment and plan, and cosigned the chart." The plaintiff did not see a health care provider as instructed but rather presented to the Good Samaritan Hospital ER, hereinafter referred to as "GSH", on May 26, 2016. She complained that there was still something wrong with her foot. At GSH the consulting podiatrist ordered another x-ray which was followed by a CT scan. The CT scan demonstrated fractures along various aspects of her right foot.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact"(CPLR3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989] ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (*see* ***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see* ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; ***Faccio v Golub***, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

After making this prima facie showing, the burden shifts to the plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (*see* ***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the prima facie burden (*see* ***Barrocales v New York Methodist Hosp.***, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; ***Stukas v Streiter***, *supra*). "General allegations of medical malpractice, merely conclusory and unsupported

by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (***Alvarez v Prospect Hosp.***, *supra*, at 325; *see* ***Brinkley v Nassau Health Care Corp.***, 130 AD3d 1287, 993 NYS2d 73 [2d Dept 2014]; ***Kramer v Rosenthal***, 224 AD2d 392, 637 NYS2d 772 [2d Dept 1996]). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; ***Gressman v Stephen-Johnson***, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; ***Moray v City of Yonkers***, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]).

For medical malpractice claims, "it is generally recognized that liability for medical malpractice may not be imposed in the absence of a physician-patient relationship" (***Megally***, 253 AD2d 35, 40, 679 N.Y.S.2d 649 [2d Dept 1998]); ***White v. Southside Hospital***, 281 AD2d 474, 721 N.Y.S.2d 678 [2d Dept 2001]; ***Zimmerly v. Good Samaritan Hospital***, 261 AD2d 614, 690 N.Y.S.2d 718 [2d Dept 1999]).

NY CLS Educ § 6542 states

> 1. Notwithstanding any other provision of law, a physician assistant may perform medical services, but only when under the supervision of a physician and only when such acts and duties as are assigned to him or her are within the scope of practice of such supervising physician.
>
> 2. Supervision shall be continuous but shall not be construed as necessarily requiring the physical presence of the supervising physician at the time and place where such services are performed.

10 NYCRR § 94.2 states

> (f) A physician supervising or employing a licensed physician assistant or registered specialist assistant shall remain medically responsible for the medical services performed by the licensed physician assistant or registered specialist assistant whom such physician supervises or employs.

In ***Latiff v Wyckoff Hgts. Hosp.***, 144 AD2d 650, 651 [2d Dept 1988], the Court held

> Where as here the appellant physician has made a prima facie showing that he did not treat or examine the infant plaintiff, the plaintiffs must come forward with evidentiary facts to rebut the physician's showing that he or she was not negligent (see, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324-325). The fact that the appellant's name appeared twice on the infant plaintiff's hospital records is not sufficient to defeat his prima facie showing that he was not negligent, absent some evidentiary facts that he did in fact treat her (see, ***Buonagurio v Drago***, 65 AD2d 830). The mother's allegation that she

> "believed" the appellant may have discussed her daughter's case with the examining physician on one occasion is not sufficient to create a triable issue of fact (see, ***Alvarez v Prospect Hosp.***, supra).

Defendant Ung has submitted the affirmation of James Ryan, M.D., who affirms that he is licensed to practice medicine in New York State, and is board certified in Internal Medicine since 1985 and Emergency Medicine since 1988. He set forth his education and training, and indicated that he reviewed pertinent medical records and depositions. Ryan has set forth his opinions within a reasonable degree of medical certainty, and states that Ung "did not have an established physician-patient relationship with plaintiff", "did not deviate from accepted standards of care in connection with the care rendered to plaintiff when she presented" to BMH on May 12, 2016, "did not even participate in plaintiff's care that day and could not possible be held liable for any acts or omissions relative to the care that was rendered." Ryan further states that it can not "be possibly argued that anything he did or did not do was the proximate cause of plaintiff's alleged injuries."

Defendant Levy has submitted the affirmation of Joshua Stillman, M.D. who affirms that he is licensed to practice medicine in New York State, and is board certified in both Emergency Medicine and Internal Medicine. He set forth his education and training, and indicated that he reviewed pertinent medical records and depositions. Stillman has set forth his opinions within a reasonable degree of medical certainty, and states that the care and treatment rendered to the plaintiff by defendant Levy "during her emergency room treatment presentation on May 12, 2016 was at all times within good and accepted medical practice and was not the cause of MS. SOKOL'S injury." He indicates that "three films are the standard initial screening series for a foot injury to look for broken bones" and that the "three plain film x-ray views of the foot were determined to show no fracture by a licensed radiologist." Stillman further opines that "PA LEVY had the appropriate training to provide emergency care, properly appreciated all the complaints made to her by the patient, took an appropriate history, performed appropriate examination and provided appropriate proper care, workup, treatment and discharge instructions" and "appropriately relied on the x-ray report prepared by DR. SLATTERY".

It is determined that, based upon Dr. Ryan's and Dr. Stillman's opinions, Lyncan Ung, D.O., M.D., and Kimberly Levy, RPA-C have established prima facie entitlement to summary judgment dismissing the complaint.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In opposition to defendant Ung's motion, the plaintiff submits an affirmation of her attorney and an expert affirmation, with the affirmant's name and signature redacted. The expert states that he is a physician licensed to practice medicine in New York State, and is board certified in Internal Medicine. He set forth his education and training and indicates that he reviewed a copy of the medical records from BMH and GSH, as well as the affirmation of James Ryan, M.D. and the deposition transcript of defendant Ung. He opined within a reasonable degree of medical certainty that defendant Lyncan Ung, D.O., M.D., deviated from accepted standard of medical care "by not personally physically examining Kathleen Sokol even after reviewing and cosigning medical records containing complaints, observations and physical exam findings obviously suspicious for fracture, in relying on simple X-rays to rule out fracture in the setting of acute swelling and in failing to order more advanced radiographic studies such as a CT scan and/or otherwise failing to aggressively an accurately rule out right foot fractures." He further opines that "these deviations from the standard of care were the proximate cause of Ms. Sokol's multiple non-displaced, displaced and avulsed fractures being missed, misdiagnosed, undiagnosed and improperly treated." He states that "One last departure by the defendants, OK'd and cosigned by defendant Ung, D.O., M.D., was rather than discharge her to Orthopedic or at least Podiatric follow-up, Ms. Sokol was simply referred to her 'Regular Doctor' furthering the risk of missed foot fractures." He opines to a reasonable degree of medical certainty that plaintiff's "history of complaints, clinical presentation and physical exam findings at [BMH] emergency department were more than sufficiently suspicious for fracture(s) and warranted either defendant Levy, RPA-C calling defendant Ung D.O., M.D. to do a physical exam personally and order appropriate radiological studies and/or warranted defendant Ung D.O., M.D. himself, upon reading all this documentation in order to cosign, intervening with his own physical exam and ordering an appropriate radiological workup". It is his further opinion that "the failure to do so directly resulted in the misdiagnosis of 'contusion' and missed diagnosis of several painful and incapacitating" fractures "that were not appropriately diagnosed nor treated for weeks."

In opposition to defendant Levy's motion, the plaintiff submits an affirmation of her attorney and an expert affirmation of Bruce Charash, M.D.. Charash states that he is a physician licensed to practice medicine in New York State, and is board certified in Internal Medicine. He set forth his education and training and indicates that he reviewed a copy of the medical records from BMH and GSH, as well as the affirmation of James Ryan, M.D. and the deposition transcript of defendant Ung. The Court notes that while defendant Levy's notice of motion is dated August 16, 2019, the physician's affirmation in opposition is dated July 12, 2019 and appears to be the same affirmation submitted in opposition to defendant Ung's motion. Charash states that "I submit the instant Affirmation in support of KATHLEEN SOKOL's claims against LYNCAN UNG, D.O., M.D." Charash opined within a reasonable degree of medical certainty that plaintiff's "history of complaints, clinical presentation and physical exam findings at [BMH] emergency department were more than sufficiently suspicious for fracture(s) and warranted either defendant Levy, RPA-C calling defendant Ung D.O., M.D. to do a physical exam personally and order appropriate radiological studies and/or warranted defendant Ung D.O., M.D. himself, upon reading all this documentation in order to cosign, intervening with his own physical exam and ordering an

appropriate radiological workup". It is his further opinion that "the failure to do so directly resulted in the misdiagnosis of 'contusion' and missed diagnosis of several painful and incapacitating" fractures "that were not appropriately diagnosed nor treated for weeks." He states that "the care rendered by defendant Levy, RPA-C departed from good and accepted standards of practice on that she (1) did not appreciate the suspicious if not obvious presentation of multiple fractures in Ms. Sokol's right foot and (2) failed to seek appropriate help from her attending physician defendant Ung, D.O., M.D.". Finally, he opines that defendant Levy "deviated from the applicable good and accepted standards of medical and hospital care in the care and treatment of Kathleen Sokol" and that those deviations "were the proximate cause of Ms. Sokol's misdiagnosis, delayed fracture diagnosis and delayed fracture treatment as well as proximate cause of Ms. Sokol's pain and disability resulting from her multiple foot fractures."

"General and conclusory allegations that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment" (***Hernandez v Nwaishienyi***, 148 AD3d 684, 686, 48 NYS3d 467 [2d Dept 2017], citing ***Alvarez v Prospect Hosp.***, *supra* at 324-325. Here the plaintiff's expert has merely given general and conclusory statement as to how the moving defendants committed medical malpractice. Charash failed to dispute any of the arguments made by defendant Levy's expert, Dr. Stillman. In addition, the plaintiff failed to indicate what injuries were caused as a result of the alleged medical malpractice of Ung or Levy. Based upon the foregoing, it is determined that plaintiff has failed to raise factual issues to preclude summary judgment from being granted to the defendants.

The motions for summary judgment are granted and the complaint is dismissed as to Lyncan Ung, D.O., M.D., and Kimberly Levy, RPA-C.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 6, 2019

HON. JOSEPH A. SANTORELLI
J.S.C.