Schaus v Yasgur
2020 NY Slip Op 34994(U)
October 7, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53490/2017
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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NANCY SCHAUS,

Plaintiff,

- against -

DAVID YASGUR, MD, CHARLES ELKIN, MD, KURT VOELLMICKE, MD, JOHN MICHAEL ABRAHAMS, MD, MARSHAL D. PERIS, MD, CAREMOUNT MEDICAL, PC, MOUNT KISCO MEDICAL GROUP, PC, NORTHERN WESTCHESTER HOSPITAL CENTER,

Defendants.

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INDEX NO. 53490/2017

DECISION/ORDER

Mot. Seqs. 3, 4, 5
Submit Date: 8/05/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF relative to the following motions: made by defendant CHARLES ELKIN, MD, (Mot. Seq. 3), for an order, made pursuant to CPLR 3212, granting him summary judgment dismissing all claims against him with prejudice, directing entry of judgment in his favor, and deleting him from the caption; made by codefendants DAVID YASGUR, MD, KURT VOELLMICKE, MD, MARSHAL D. PERIS, MD, and CAREMOUNT MEDICAL, PC F/K/A MOUNT KISCO MEDICAL GROUP, PC, (Mot. Seq. 4), for an order, made pursuant to CPLR 3212, granting said codefendants summary judgment; and made by defendant NORTHERN WESTCHESTER HOSPITAL CENTER (Mot. Seq. 5), for an order, made pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff NANCY SCHAUS as against it in its entirety, and removing its name from the caption.

Plaintiff commenced this medical malpractice action by filing a summons and verified complaint in March 2017, alleging that she became permanently paralyzed in October 2014 due to delayed diagnosis of, and surgical intervention for, a fracture in her lower thoracic spine that occurred while she was a patient at the hospital of defendant Northern Westchester Hospital Center (the Hospital). The fracture occurred following a revision right hip replacement surgery performed on October 17, 2014 (a Friday) by Yasgur, an orthopedic surgeon employed by the Hospital. Voellmicke, also an orthopedic surgeon, was the on-call

physician covering for Yasgur over the weekend following the revision surgery. On the morning of October 20, 2020, Elkin, a radiologist, reviewed the computed tomography (CT) scans that were taken of plaintiff on October 19, 2020, after those scans had already been reviewed by nonparty teleradiologist Erinn Noeth, MD (Noeth). Peris, an orthopedic spine surgeon, performed a laminectomy on plaintiff on the evening of October 20, 2020 in an effort to decompress her spine. Defendant Caremount Medical, PC (Caremount) employed Yasgur, Voellmicke, and Peris.[1]

In April 2017, Elkin filed a verified answer, asserting 10 affirmative defenses. Shortly thereafter, the remaining defendants — with the exception of John Michael Abrahams, M.D. — interposed an answer asserting eight affirmative defenses. A trial readiness order was issued on December 18, 2019. Plaintiff filed the note of issue the following day.

Now, Elkin moves for summary judgment dismissing the complaint insofar as asserted against him (mot. seq. 3). Caremount, Yasgur, Voellmicke, and Peris (collectively referred to as the Caremount defendants) separately move for summary judgment dismissing the complaint insofar as asserted against each of them (mot. seq. 4). The Hospital moves for summary judgment dismissing the complaint insofar as asserted against it (mot. seq. 5).[2] Said defendants submit, among other things, the pleadings, deposition transcripts of the parties involved, and the medical records of plaintiff in connection with this action. The parties also proffer and rely on various expert affirmations to support either the granting or denial of summary judgment.

"In order to establish a prima facie case of liability in a medical malpractice action, the plaintiff must show (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Bueno v Allam*, 170 AD3d at 941 [internal quotation marks and citations omitted]; *see Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1098 [2d Dept 2010]). "A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any alleged departure was not a proximate cause of the plaintiff's injuries" (*Bueno v Allam*, 170 AD3d at 941 [internal quotation marks and citations omitted]; *accord Leigh v Kyle*, 143 AD3d 779, 781 [2d Dept 2016]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the

[1] The causes of action against John Michael Abrahams, M.D., a neurosurgeon who did not operate on plaintiff, were discontinued by stipulation so ordered by the undersigned in March 2020 (NYSCEF Doc No. 166).

[2] In opposition to the defendants' motions, plaintiff states: "[t]o the extent that any of the defendants have moved for summary judgment seeking dismissal of plaintiff's Second Cause of Action, the Public Health Law 'Informed Consent' cause of action, the same is hereby withdrawn as to all defendants, regarding that portion of any motion moot. Plaintiff voluntarily discontinues only this statutory cause of action" (affirmation in opposition of plaintiff's counsel, ¶ 37). Accordingly, the court need not address the issue of informed consent.

defendant [physician] met the prima facie burden" (*Leigh v Kyle*, 143 AD3d at 781 [internal quotation marks and ellipses omitted]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *B.G. v Cabbad*, 172 AD3d 686, 687 [2d Dept 2019]; *Brady v Westchester County Healthcare Corp.*, 78 AD3d at 1098).

It is well settled that "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Mehtvin v Ravi*, 180 AD3d 661, 664 [2d Dept. 2020]; *accord Moyer v Roy*, 152 AD3d 1188, 1189 [4th Dept 2017]; *Poter v Adams*, 104 AD3d 925, 927 [2d Dept 2013]). Varying medical opinions adduced by the parties raise material "credibility issues [that] can only be resolved by a jury" (*Macancela v Wyckoff Hgts. Med. Ctr.*, 176 AD3d 795, 798 [2d Dept 2019]; *Nisanov v Khulpateea*, 137 AD3d 1091, 1094 [2d Dept 2016]; *Berthen v Bania*, 121 AD3d 732, 733 [2d Dept 2014]; *see also DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012]; *Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]). Under the foregoing principles, the court will address each of the motions in turn.

I. ELKIN'S MOTION (MOT. SEQ. 3)

Turning first to plaintiff's claims against Elkin, the parties' experts dispute whether Elkin timely and properly interpreted the CT scans of October 19, 2014 and the MRI studies conducted on October 20, 2014. The court, however, finds this dispute to be irrelevant based on the record.

Elkins submitted, *inter alia*, the expert affirmation of Adam R. Silvers, MD, a radiologist and neuroradiologist. Silver opined with a reasonable degree of medical certainty that Elkin's action or inactions in interpreting and reporting the CT scans did not deviate from the accepted standard of medical care. Silvers surmised that Peris did not rely upon Elkin's interpretation of the films in question. Ultimately, Silvers concluded that the care and treatment rendered by Elkin did not contribute to any of plaintiff's alleged delay in diagnosis or treatment.

In contrast, plaintiff submitted the expert affirmations of Jacob Rozbruch M.D., board certified in the field of orthopedic surgery, and Sondra J. Pfeffer, M.D., board certified by the American Board of Radioiogy. Rozbruch opined that Elkin deviated from the standard of medical care by his undue delay in performing the laminectomy on plaintiff's spine, and failing to directly communicate severe cord compression to any physician at the Hospital on October 20, 2014. Rozbruch concluded that Elkin's delay in diagnosis and treatment were a substantial factor in causing plaintiff prolonged spinal cord compression and paralysis. Pfeffer opined with a reasonable degree of medical certainty that Elkin departed from the good and accepted medical practice by failing to properly interpret the CT scans of plaintiff's chest, abdomen, and pelvis that were conducted on October 19, 2014.

The record, however, reflects that the codefendant physicians did not rely on Elkin's findings in determining their course of treatment with respect to plaintiff. Indeed, Peris

independently reviewed the CT scans of October 19, 2014 prior to Elkin's involvement, and Abrahams independently reviewed the radiology studies in the late afternoon on October 20, 2020. Moreover, to the extent plaintiff asserts that Elkin failed to directly convey his MRI findings to any member of plaintiff's medical team, the record reveals that Yasgur reviewed Elkin's MRI report within 20 minutes of its completion and more than four hours before plaintiff's laminectomy was set to begin. Even if Elkin did not directly convey a finding of severe stenosis to plaintiff's medical team, Yasgur was indisputably aware of the existence of severe stenosis even before Elkin reviewed the CT scan, and conveyed as much to Peris. Contrary to plaintiff's contention, Silvers squarely addressed plaintiff's allegation in the bill of particulars that Elkin failed to properly communicate the results of radiological studies in a timely manner.

Accordingly, the court finds that Elkin established his prima facie entitlement to judgment as a matter of law (*see Reid v Soults*, 138 AD3d 1087, 1090 [2d Dept 2016] [finding that the defendant radiologists were entitled to summary judgment where another physician "unequivocally testified that he did not look at the radiologists' reports and interpreted the CT scans himself," thereby establishing that "any departures in [the radiologists'] interpretation of the CT scans were not a proximate cause of the claimed injuries"]; *see also Elkin v Goodman*, 24 AD3d 717, 718-719 [2d Dept 2005]). The conclusions of plaintiffs' experts relative to causation on Elkin's part are either speculative or belied by the record. Accordingly, plaintiff has failed to raise a triable issue of fact in opposition (*see Reid v Soults*, 138 AD3d at 1090); and therefore, Elkin is entitled to summary judgment dismissing the complaint and any cross claims related thereto, insofar as asserted against him.

II. THE CAREMOUNT DEFENDANTS' MOTION (MOT. SEQ. 4)

In moving for summary judgment, the Caremount defendants insist that a surgical consult was in fact obtained from Abrahams, the neurosurgeon. However, this consult occurred at around 3:00 p.m. on October 20, 2014 — long after Yasgur became aware at 8:00 a.m. that plaintiff could no longer move her legs. Abrahams testified that he was only 20 minutes away when Yasgur first contacted him about plaintiff on the afternoon of October 20, 2014 and that he drove directly to the hospital and examined her. In short, the Caremount defendants failed to squarely address plaintiff's contention that they did not obtain an immediate consult. In addition, their assertion that Abrahams had the ability to perform the laminectomy before Peris is contradicted by the record. Notably, at his examination before trial, Abrahams agreed with the statement that "when you're dealing with somebody that has compression of the spine that's causing paraplegia, that the sooner you operate, the better off the chances of the patient — having resuming use of their legs is."

Applying the legal principles set forth above, the court finds that the Caremount defendants are not entitled to summary judgment. The dueling expert reports generate issues of fact as to whether Yasgur departed from good and accepted medical practice in

failing to ensure that a STAT MRI was immediately performed on October 20, 2014,[3] and failing to either ensure Peris' availability to perform the laminectomy in a timely manner, or obtain an immediate spine surgery consult with a different doctor. Moreover, Yasgur testified that plaintiff's condition was "a spine emergency as of approximately 8:00 or 8:15 in the morning" of October 20, 2014, that plaintiff was paralyzed when he saw her on the morning on October 20, 2014, and that he had no knowledge of when Peris would be available to perform a laminectomy. In addition, an issue of fact exists as to whether these alleged departures delayed the performance of plaintiff's laminectomy, thereby leading to her permanent paralysis.

With respect to Peris, there remain issues of fact as to whether he departed from good and accepted medical practice in failing to either promptly perform plaintiff's laminectomy or inform Yasgur to immediately contact a different doctor for an emergency laminectomy. There is also an issue of fact as to whether these alleged departures led to an approximately nine-hour delay in the decompression of plaintiff's spine, thereby leading to her permanent paralysis.

As for Voellmicke, there remain issues of fact as to whether he departed from the accepted standard of medical practice by failing to order a thoracic spine MRI on October 19, 2014, failing to obtain a consult from a spine surgeon on October 19, 2014, and failing to order neuro checks for plaintiff on said date. Likewise, an issue of fact exists as to whether Voellmicke's alleged departures delayed the performance of plaintiff's laminectomy, thereby leading to her permanent paralysis.

The parties' submissions present conflicting expert opinions as to whether Yasgur, Voellmicke, and Peris departed from the accepted standard of medical care, and whether the alleged deviations caused plaintiff's alleged injuries, thus raising issues of credibility that are within the province of the factfinder (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]; *see Nisanov v Khulpateea*, 137 AD3d at 1094-1095). The court finds that, on this record, there are triable issues of fact as to departure and causation that may have led to plaintiff's injuries (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d at 904). Because Yasgur, Voellmicke, and Peris are not entitled to judgment as a matter of law, the relief sought by Caremount, which would be vicariously liable for the alleged malpractice of its employees, must also be denied.[4] Accordingly, the Caremount defendants' motion for summary judgment dismissing the complaint insofar as asserted against each of them is denied (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d at 904; *Nisanov v Khulpateea*, 137 AD3d at 1094-1095; *see also Lee*

[3] The court finds the Caremount defendants' reliance on *Baidach v Togut* (8 AD2d 838 [2d Dept 1959], *appeal dismissed* 7 NY2d 128 [1959]) to be misplaced.

[4] Despite this finding, the Court agrees with Caremount's position that plaintiff failed to give sufficient notice in her bill of particulars that she sought to hold Caremount liable for malpractice allegedly committed by nonparty physician Dayna Yardeni (*see Golubov v Wolfson*, 22 AD3d 635, 636 [2d Dept 2005]).

v Fenton, 116 AD3d 945, 945-946 [2d Dept 2014]; *Olgun v Cipolla*, 82 AD3d 1186, 1187-1188 [2d Dept 2011]).

III. THE HOSPITAL'S MOTION (MOT. SEQ. 5)

In support of its motion, the Hospital submitted, among other things, the affidavit of Meg Warren, a registered nurse practicing nurse since 2014. Warren opined with a reasonable degree of nursing certainty that the Hospital's treatment of plaintiff during her admission satisfied the requisite standard of care and did not proximately cause her injuries. She mainly faulted the surgeon and private attending physicians. Warren explained that it is the surgeon's responsibility to order postoperative physical therapy, that the hospital staff appropriately deferred to the surgeon's judgment, and that the physician's order as to postoperative physical therapy evaluation and weight bearing was appropriately followed by the hospital staff. She urges that the nursing staff had no obligation to determine the cause of plaintiff's complaints or to diagnose medial conditions, and that the Hospital's nursing staff conducted timely and appropriate nursing assessments of plaintiff. Warren added that the nursing staff's evaluations of plaintiff "comported with the standard of nursing care and was in accordance with the hospital policy and the physician's orders"; that the nurses maintained appropriate communication with the plaintiff's attending physicians; timely apprised the attending physicians of plaintiff's condition, including the test results; and appropriately administered medications to plaintiff in accordance with the physicians' orders.

Plaintiff, in opposition, submitted the affidavit of Mary Stein, a registered nurse since 1976. Stein opined with a reasonable degree of certainty that the Hospital's nurses assigned to oversee plaintiff departed from good and accepting nursing practices by failing to conduct neurovascular checks of plaintiff at the proper intervals, even in the absence of a specific order from a physician. Stein states that the nurses attending to plaintiff "in the Step-Down unit did not require a specific physician's order for neurovascular checks in order to conduct a complete neuroflow assessment." Stein surmised that the Hospital's nursing staff attending to plaintiff from October 18, 2014 through October 20, 2014 failed to properly conduct an evaluation of plaintiff's sensory and motor functions of her lower extremities, thus proximately causing plaintiff's resultant injuries by delaying the diagnosis and treatment of her condition.

Based on the foregoing, the court likewise finds that issues of fact exist as to whether the Hospital nursing staff departed from the accepted standard of care by failing to communicate with Voellmicke about their performance of neurovascular assessments of plaintiff, and whether these alleged departures delayed the diagnosis and treatment of plaintiff's spinal cord compression, ultimately leading to her permanent paralysis (*see Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 740 [2d Dept 2017]; *Reustle v Petraco*, 155 AD3d 658, 660 [2d Dept 2017]). There are inherent issues of fact as to whether the Hospital was negligent in monitoring or assessing plaintiff, which ought to be resolved by the trier of fact. Accordingly, the Hospital's motion for summary judgment is denied based on the doctrine of respondent superior, coupled with plaintiff's allegations with

respect to the Hospital's nursing staff (*see Seiden v Sonstein*, 127 AD3d 1158, 1161 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 735-736 [2d Dept 2014]; *see generally Crannell v Kim*, 255 AD2d 773, 774 [3d Dept 1998]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendant CHARLES ELKIN, MD, (Mot. Seq. 3), for an order, made pursuant to CPLR 3212, granting him summary judgment dismissing all claims against him with prejudice, directing entry of judgment in his favor, and deleting him from the caption, is granted in its entirety; and it is further

ORDERED that the motion of codefendants DAVID YASGUR, MD, KURT VOELLMICKE, MD, MARSHAL D. PERIS, MD, and CAREMOUNT MEDICAL, PC F/K/A MOUNT KISCO MEDICAL GROUP, PC, (Mot. Seq. 4), for an order, made pursuant to CPLR 3212, granting them summary judgment, is denied; and it is further

ORDERED that the motion of defendant NORTHERN WESTCHESTER HOSPITAL CENTER (Mot. Seq. 5), for an order, made pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff NANCY SCHAUS as against it in its entirety, and removing its name from the caption, is denied; and it is further

ORDERED that the caption shall be amended to remove defendant CHARLES ELKIN, MD in accordance with the determinations made in this decision; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court at a date, time, and manner to be hereafter directed by said Part.[5]

The foregoing constitutes the decision and order of the court.

Dated: October 7, 2020
White Plains, New York

ENTER:

HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES: Parties appearing via NYSCEF.

[5] Due to the COVID-19 health emergency, the Clerk of the Settlement Conference Part will notify the remaining parties of the date, time, and method of the settlement conference.