SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH REEVES MCMAHON** **PART**

Justice

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LAWRENCE WILSON, DESIREE FISH

Plaintiff,

- v -

ARIEL OSTAD, ARIEL OSTAD, M.D., P.C.,

Defendant.

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INDEX NO. 805026/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Defendants Ariel Ostad, M.D. ("Dr. Ostad") and Ariel Ostad, M.D., P.C. ("Ostad P.C.") (collectively "Defendants") move this Court for an Order granting them summary judgment pursuant to CPLR §3212 and dismissing the Complaint as against them with prejudice. ("Motion"). The Court hereby grants Defendants' Motion for summary judgment in part and denies it in part.

FACTS

Plaintiffs Lawrence Wilson ("Mr. Wilson") and Desiree Fish ("Ms. Fish") (collectively "Plaintiffs") commenced this Action by filing a Summons and Complaint on January 14, 2018 for medical malpractice, lack of informed consent and loss of services. Mr. Wilson commenced treatment with Dr. Ostad, a dermatologist, in 2001 when he was seventy-one years old. In 2007,

Dr. Ostad found melanoma on Mr. Wilson's scalp. Over the years, Dr. Ostad performed 16 Mohs Micrographic Surgery ("MMS") procedures to remove skin lesions on different parts of Mr. Wilson's body. Dr. Ostad also performed several procedures on Mr. Wilson, including Botox injections, cosmetic fillers, cool sculpting, total body scans and biopsies. In October 2016, Mr. Wilson had a drug-eluting stent placed in his left anterior descending ("LAD") artery by Dr. Carl Reimers at Lenox Hill Hospital. Mr. Wilson was immediately placed on a six-month course of blood thinner medication to reduce the risk of clotting after his stent procedure. While he was initially prescribed Plavix, Mr. Wilson developed recurrent nosebleeds and was therefore switched to Brilinta for the remaining duration of the six months.

Mr. Wilson presented to Dr. Ostad on December 21, 2016 to undergo a total body check for skin cancer screening, during which it was documented that Mr. Wilson had noticed spot(s) on his right lateral lower leg that changed in size and color. According to Dr. Ostad's notes, the physical exam showed an ill-defined erythematous patch on Mr. Wilson's right lateral lower leg. Dr. Ostad believed the 2 cm lesion was suspicious for a squamous cell carcinoma ("SCC") and therefore performed an excisional biopsy. The Dermatopathology Report revealed "a crater-like lesion filled with ortho- and parakeratotic cells and lined by a hyperplastic epithelium with atypical keratinocytes in its lower portion," with "[m]any keratinocytes hav[ing] abundant eosinophilic cytoplasm." The diagnosis was "probable keratoacanthoma" but the report noted that "a squamous cell carcinoma cannot be excluded with certainty in these sections." Plaintiffs represent that Dr. Ostad advised that this type of skin lesion could potentially grow rapidly and invade locally and deeply. Dr. Ostad's treatment plan was to perform MMS.

Plaintiffs represent that after Dr. Ostad's office informed Mr. Wilson that he had to undergo MMS and needed to stop taking any anticoagulants before the procedure, Mr. Wilson

contacted his cardiologist Dr. Oboler and his primary care physician ("PCP") Dr. Gelbard. According to Plaintiffs, both Dr. Oboler and Dr. Gelbard told Mr. Wilson that he could not stop taking Brilinta, he should not undergo MMS while taking Brilinta and that he should wait to schedule the procedure after he stopped taking this medication. According to Plaintiffs, Mr. Wilson called Dr. Ostad and told him that he did not want to undergo the MMS based on the advice of his cardiologist and PCP. Mr. Wilson represents that Dr. Ostad insisted that he had experience performing MMS on patients taking anticoagulants and it would not be an issue. Dr. Ostad allegedly also told Mr. Wilson that he had to proceed with the MMS procedure because the lesion would just get bigger if he waited. Mr. Wilson represents that relying upon Dr. Ostad's representation and their longstanding relationship, he decided to undergo the MMS procedure.

Mr. Wilson presented to Dr. Ostad's office to undergo the MMS procedure on January 10, 2017. Dr. Ostad testified that before having Mr. Wilson sign the consent form, he would have reviewed the risks associated with MMS, risks of bleeding due to Brilinta, possible alternative treatments and the need for Mr. Wilson to post-operatively elevate his leg and stay off his feet. Mr. Wilson also completed a Mohs Decision for Medical Necessity Form, which indicated that MMS was medically necessary since the lesion was larger than 2 cm in diameter on a non-facial area and that the diagnosis was supported by the biopsy report. After Mr. Wilson was locally anesthetized, Dr. Ostad excised the tissue with approximately three-to-four-millimeter margins and cauterized the area to ensure there was no bleeding. Mr. Wilson was bandaged and told to stay in the waiting room while Dr. Ostad examined the tumor margins to ensure the margins were clear. After confirming that the margins were clear, Dr. Ostad closed the surgical wound with sutures. According to Dr. Ostad's office notes, Mr. Wilson was

instructed to elevate his leg and not walk around. Mr. Wilson was discharged in stable condition, made no complaints before leaving the office and took a cab home.

Mr. Wilson testified that he called Dr. Ostad's office after he saw blood "pouring down" his right leg and was told to come back to the office. Mr. Wilson presented to Dr. Ostad's office the same day at 2:10 PM with bruising, swelling and bleeding at the surgical site extending down to the ankle. According to Dr. Ostad's notes, "patient states he went home after his surgery, walked his dog and then went to lay down in bed. He reports feeling pain and active bleeding for 1 hour before returning to the office." The Court notes that Plaintiffs contest Dr. Ostad's notes and state that Mr. Wilson "specifically denied walking his dog in the interim." Mr. Wilson used a washcloth as a tourniquet to slow the bleeding. After Dr. Ostad removed the pressure bandage, he noted there was a hematoma, active bleeding and a 3.5-inch laceration adjacent to the surgical site. Mr. Wilson lost approximately a quart of blood.

Dr. Ostad used sterile gauze to apply manual pressure for 20 minutes and Mr. Wilson was given Ativan and Oxycodone to decrease his blood pressure and to help relax him. Dr. Ostad removed the sutures without issue and evacuated the hematoma. Dr. Ostad cauterized the bleeders and placed new sutures to repair the surgical defect and laceration. Dr. Ostad's notes reflect that Mr. Wilson reported hot sweats, shakiness and dizziness. A pressure bandage with an Ace wrap was applied and he was placed in Trendelenburg position with an ice pack placed to his chest. Mr. Wilson was discharged sixty minutes later in stable condition with instructions to keep his elevated and not walk on his foot. According to his notes, Dr. Ostad spoke with Mr. Wilson's cardiologist and internist, who both strongly advised against stopping Brilinta since Mr. Wilson needed to complete his six-month course of the medication.

On January 11, 2017, Nurse Jennifer Schroeder called Mr. Wilson at 9:12 a.m., during which time Mr. Wilson noted he had mild pain (which improved from the previous day), denied bleeding at the site and stated that he began taking the prescribed antibiotic the night before. Mr. Wilson also said that he regretted having the MMS procedure and "will take the advise (sic) of his cardiologist and refrain from any additional surgical procedures until he is able to hold Birlinta (sic)." Less than one hour later, Mr. Wilson presented to Dr. Ostad's office at 10:00 a.m. with complaints of bleeding. Mr. Wilson had a blister on his right posterior lower leg with bubble-like lesions, as well as a dark purple patch. According to Plaintiffs, Mr. Wilson presented "with a sock and shoe soaked with serosanguinous drainage from the surgical site." Mr. Wilson underwent an incision and drainage of the bullae before being discharged in stable condition with instructions to remain off his feet for 24 hours.

Mr. Wilson returned to Dr. Ostad's office to have his bandage changed on January 12, 2017. Mr. Wilson complained of shooting pain on the incision area and pain after being seated for a long period of time. Upon physical examination, it was noted that the right lateral ankle had erythematous fluid-filled nodules and erythema and the right lateral lower-leg had sutured wound with erythema and bruising. Incision and drainage of the seven bullae located on Mr. Wilson's right lateral ankle were performed. The surgical site was cleaned, the bandage was changed and an Ace wrap was placed. Dr. Ostad recommended Mr. Wilson take Tylenol and Ativan while continuing to rest with his leg elevated. Dr. Ostad told Mr. Wilson he could go to his home on Long Island, but that he had to take it easy and follow-up in one day. According to Dr. Ostad's testimony, there was no evidence of infection.

Plaintiffs represent that Mr. Wilson presented again on January 13, 2017 with several complaints, including bleeding, aching, blistering, oozing, an open wound, pain when walking,

tenderness and ulceration. According to Dr. Ostad's records, Dr. Ostad advised Mr. Wilson that the site was healing well and that it was okay to shower, get the area wet and resume general walking. Since there was no evidence of bleeding, the ace wrap was no longer necessary and there were no signs or symptoms of infection at the visit. Mr. Wilson was told to follow up in two days. Mr. Wilson subsequently went to his house on Long Island for the weekend, at which time standing and walking became increasingly painful and the surgical wound was starting to get red.

According to deposition testimony, the Plaintiffs contacted Dr. Ostad on January 14th and 15th, at which time Dr. Ostad told them to keep the leg elevated, change the dressing using gloves, apply Bacitracin and follow-up on Monday. On January 16, 2017, Mr. Wilson was scheduled for a Doppler of his right leg to rule out a DVT at East River Medical Imaging, which never took place. Mr. Wilson contacted his PCP, who advised him to go to the Lenox Hill Hospital's Emergency Department ("ED"). Mr. Wilson presented to Dr. Ostad's office on January 16th prior to going to the ED with complaints of shooting pain that increased in the last two days, difficulty putting weight on his right leg due to pain, increasing redness and blisters. Mr. Wilson represented that he completed his five-day course of antibiotics. Physical examination showed that Mr. Wilson had indurated erythematous scar with surrounding erythema extending down his ankle and dorsal foot. Mr. Wilson had a bulla on his right lateral ankle for which Dr. Ostad performed incision and drainage, with less than 1 mL serous fluid drained. Dr. Ostad's impression was cellulitis secondary to MMS. After obtaining cultures to rule out infection, Dr. Ostad noted that Mr. Wilson was going to the ED to see a vascular surgeon and advised him to see an infectious disease specialist to rule out an infection and for IV antibiotic therapy.

Mr. Wilson presented to Lenox Hill Hospital's ED with complaints of significant bleeding from the surgical site after the MMS, increasing redness and pain. The ED physicians believed Mr. Wilson had tissue injury secondary to pressure dressing. Dr. Gelbard documented that she and Mr. Wilson's cardiologist advised Mr. Wilson to wait until six months after his stent placement so his anticoagulation could be held. Dr. Gelbard's assessment included right lower extremity hematoma, pressure necrosis and cellulitis. Dr. Gelbard obtained two blood cultures and placed Mr. Wilson on empiric IV antibiotics. On January 17th, Dr. Gelbard documented that Mr. Wilson spiked a fever overnight and experienced chills with shaking. Mr. Wilson's antibiotics were changed and Infectious Disease was consulted. Upon physical examination, it was noted that Mr. Wilson's right lower extremity was warm, had blackened areas of necrotic skin and was tender.

On January 18, 2017, Mr. Wilson was evaluated by the Infection Disease specialist, who made an assessment of probable beta hemolytic streptococcal cellulitis given the presence of bullae and abrupt onset and recommenced continuing antibiotic therapy paired with local wound care. Mr. Wilson was discharged home on January 20, 2017 to continue IV antibiotics for six days. Mr. Wilson was also told to follow-up as an outpatient with his vascular surgeon and Infectious Disease specialist. During his deposition, Mr. Wilson testified that he still suffers from right leg weakness/instability that impacts his gait, causes him to fall and restricts his ability to walk and travel. Mr. Wilson further testified that such injury required physical therapy and assistive devices.

Dr. Ostad testified that while he knew Mr. Wilson was taking Brilanta on the day he performed the MMS, he was not aware that Mr. Wilson had switched from another blood thinner

to Brilinta due to episodes of excessive bleeding. When asked how he became aware that Mr. Wilson was on Brilinta prior to performing the MMS, Dr. Ostad testified that

> I certainly knew when it came time to be doing the surgery because we had a discussion about it prior to starting the surgery that day. I don't know if we had a phone conversation. I don't remember. I want to say maybe. I have a feeling he called me about it to discuss his concerned about Brilinta. I certainly know we had a conversation at the time of the surgery. And my answer to him was, it absolutely no sense for him to stop his Brilinta, given the stent that was placed in his LAD. LAD, stands for Long Ascending Artery. It's a main coronary artery, otherwise known as the widow maker and it that gets blocked, there is a high change of death and that's where he had his stent placed, and that's why he was on Brilinta, to make sure that stent does not close. And for me, it was absolutely not an option to stop the Brilinta, knowing there is a risk that that stent can close. He would have to be off his Brilinta for a few days before, not to initiate it for a couple of days after. And that window can potentially cause death. And to me, being on Brilinta, knowing full well that it increases his risk of bleeding, was a better option for him to go off Brilinta."

Dr. Ostad further testified that since he believed Mr. Wilson was going to be on the Brilinta for at least another five to six months, "it did not make sense to postpone surgery for another five, six months, knowing the potential nature of this lesion." According to Dr. Ostad, the Keratoacanthoma type of SCC could have invaded further and deeper into the muscle or "go elsewhere", which would have subjected Mr. Wilson to a "much, much more complicated surgery." Dr. Ostad testified that he never attempted to contact Mr. Wilson's PCP or cardiologist prior to performing the MMS on him to discuss the issue, explaining

> I'm his surgeon and I didn't need to contact them for the surgery. I knew he was on Brilinta, I knew what Brilinta is and I knew what he was going to do. I knew the nature of his disease and I knew the nature of his medical history, so I felt that – I felt that I could have – that it was okay to proceed to do his procedure, knowing the risk of bleeding."

According to Dr. Ostad, the standard of care would require him to communicate with the PCP or cardiologist "only if you need to stop the medication", which would not be possible in Mr. Wilson's case since Mr. Wilson would have to stay on the Brilinta "to save his life.

According to Plaintiffs' Verified Bill of Particulars, Dr. Ostad failed to appreciate the significance of the risks of performing surgery on Mr. Wilson while he was taking Brilinta, caused Mr. Wilson to have excessive bleeding, failed to properly close the incision and failed to consult with Mr. Wilson's internist and/or cardiologist prior to performing MMS. Plaintiffs further allege that Dr. Ostad failed to timely diagnose and treat Mr. Wilson's infection, appreciate Mr. Wilson's elevated post-operative blood pressure, take the necessary steps to admit Mr. Wilson to the hospital and properly address his post-operative complaint.

Defendants' Motion for Summary Judgment

In support of their motion for summary judgment, Defendants submit the affidavit of Jeffrey Ellis, M.D. ("Dr. Ellis"), who states that the MMS performed on Mr. Wilson's lower right leg was done in accordance with good and accepted surgical practice. Dr. Ellis opines that Brilinta is not a contradiction to MMS and that there was no reason to postpone the surgery. According to Dr. Ellis, Keratoacanthoma has "both metastatic potential and the potential to grow rapidly if untreated" and treating it as soon as possible "to keep the wound as small as possible" was appropriate. Dr. Ellis further opines that "there was no reason for Dr. Ostad to contact the plaintiff's primary care physician or his cardiologist, prior to the Mohs procedure. Dr. Ostad was aware the patient was on Brilinta and was aware of the risks of bleeding." Furthermore, Dr. Ellis states, Dr. Ostad "was under no obligation" to contact Mr. Wilson's PCP or cardiologist prior to the procedure. Dr. Ellis explains that Dr. Ostad took every precaution to make sure the wound was not bleeding or actively oozing during the procedure. Dr. Ellis states that Dr. Ostad also properly closed the wound at the end of the surgery.

Dr. Ellis maintains that while Dr. Ostad properly and emphatically told Mr. Wilson to go home and elevate his leg after the procedure, the notes reflect Mr. Wilson went home and walked

his dog after the procedure. Dr. Ellis opines that "to a reasonable degree of medical certainty that the bleeding after the Mohs surgery was caused by failure of Mr. Wilson to follow Dr. Ostad's orders" and that Mr. Wilson was negligent by walking his dog shortly after the surgery. Dr. Ellis states that when Mr. Wilson returned to Dr. Ostad's office with complaints of bleeding on the same day as the surgery, Dr. Ostad appropriately managed Mr. Wilson's bleeding at the surgical site by removing the bandage, applying manual pressure, performing an evacuation of the hematoma and re-suturing the wound. Dr. Ellis opines that Mr. Wilson was also properly monitored before leaving Dr. Ostad's office on that day.

Dr. Ellis explains that Dr. Ostad properly performed an incision and drainage on January 11th and January 12th, during which time there was no reason for Dr. Ostad to change the patient's management or send him to the emergency room. According to Dr. Ellis, there was also no indication for Dr. Ostad to be concerned abut Mr. Wilson's condition or an indication he should send Mr. Wilson to the emergency room during the January 13th office visit or telephone calls with Plaintiffs on January 14th and 15th. Dr. Ellis further opines that Dr. Ostad appropriately directed Mr. Wilson to go to the emergency room on January 16th. Dr. Ellis maintains that Dr. Ostad did not depart from the accepted standards of care in treating Mr. Wilson or that any act or omission on his part was a substantial factor in causing the injuries alleged. Dr. Ellis explains that based upon Dr. Ostad's deposition testimony and the forms signed by Mr. Wilson prior to the procedure, Dr. Ostad provided him with the appropriate information regarding potential risks of surgery and obtained valid consent from Mr. Wilson prior to commencing the procedure.

Plaintiffs' Opposition to Defendants' Motion

In opposition to Defendants' motion, Plaintiffs submit a redacted affidavit by a medical doctor, who is board certified in Internal Medicine with a sub-certification in Infectious Disease ("Plaintiffs' Expert"). Plaintiffs' Expert explains that Keratoacanthoma is a "relatively common low-grade cutaneous tumor" that has a rapid initial growth of up to six to eight weeks, followed by a variable period of lesion stability (lasting several weeks to several months) and then, in most cases, spontaneous resolution (a process that takes four to six weeks or longer)." In most cases, such tumors only cause "minimal skin destruction" and rarely "may behave more aggressively and can metastasize." According to Plaintiffs' Expert, SCC is the second most common form of skin cancer and is slow-growing and rarely metastasizes. Discussing the various factors that are used to determine the treatment option for Keratoacanthoma and SCC, Plaintiffs' Expert states that the 2017 standard of care required a period of close monitoring in the case of a stent patient with a new Keratoacanthoma ("KA") or SCC who requires uninterrupted blood thinners in the short term. While the biopsy could not exclude SCC, "Mr. Wilson's lesion, whether it was a KA or SCC, did not require urgent treatment given that it was a new lesion with a very low risk of aggressive local growth or metastasis if left untreated." Plaintiffs' Expert further explains that Dr. Ostad departed from the standard of care in failing to offer Mr. Wilson the alternative of waiting to do the MMS procedure and monitoring the lesion until he stopped taking Brilinta.

Plaintiffs' Expert maintains that the standard of care required Dr. Ostad to consult with Mr. Wilson's cardiologist and/or PCP to discuss the nature of the surgical treatment, whether the anticoagulation medication needed to be continued for the procedure, how long Mr. Wilson would be required to take Brilinta and the risk for excessive bleeding considering his history of

excessive nosebleeds while taking blood thinners. According to Plaintiffs' Expert, the standard of care requires such coordination since the PCP and cardiologist are best positioned to calculate the risk of discontinuing the medication and/or proceeding with the surgical procedure without stopping it. Plaintiffs' Expert further explains that had Dr. Ostad contacted the PCP or cardiologist prior to the procedure, he would have been made aware that Mr. Wilson would be stop taking the Brilinta in three months and had a history of excessive bleeding while on Plavix in addition to chronic kidney disease. Plaintiffs' Expert maintains that Dr. Ostad's failure to contact Mr. Wilson's doctors, particularly upon learning of their opinion that Mr. Wilson should not proceed with the MMS while he was on Brilinta, constituted a departure from the standard of care. While Plaintiffs' Expert shares the opinion of Dr. Ellis in that Mr. Wilson could not discontinue the Brilinta for the six-month period, he states that Mr. Wilson's risk of excessive bleeding "clearly outweighed the benefits of proceeding with an immediate MMS in January 2017 to treat this skin lesion, whether that lesion was a KA or a SCC" and Dr. Ostad departed from the standard of care in deciding to go forward with the MMS instead of observing the lesion for the last three months of the Brilinta course of treatment.

Regarding Mr. Wilson's post-operative treatment, Plaintiffs' Expert opines that Dr. Ostad and his staff departed from the standard off care by improperly applying compression bandages and Ace wrap to Mr. Wilson's right lower leg and caused soft tissue pressure damage. Plaintiffs' Expert further explains that the standard of care required Dr. Ostad to refer Mr. Wilson to the ED or wound specialist for treatment by January 13th at the latest based upon his symptoms. Plaintiffs' Expert maintains that Dr. Ostad's failure to refer Mr. Wilson to an ED or wound specialist after learning about the progression of his symptoms on January 14th and 15th constituted a departure from the standard of care. Plaintiffs' Expert opines that Dr. Ostad's

departures from the standard of care were also significant contributing factors in causing Mr. Wilson to suffer persistent right leg pain, scarring, weakness/instability, persistent right ankle discomfort and related limitations on his activities. Regarding Dr. Ellis' assertion that Mr. Wilson contributed to his injuries by walking his dog after the procedure, Plaintiffs' Expert points to Mr. Wilson's testimony that he denied walking his dog between the first and second presentation to Dr. Ostad's office on January 10, 2017.

DISCUSSION

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Dallas-Stephenson v. Waisman,* 39 AD3d 303, 306 [1st Dept., 2007]. Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

Standard for Summary Judgment in Medical Malpractice Actions

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (*See Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). "Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to

plaintiff to 'rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.'" *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants." *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002].

"To defeat summary judgment, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted). "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.*, 68 NY2d 320, 325 [1986]. (*See Otero v. Faierman*, 128 AD3d 499, 500 [1st Dept 2015]. *See generally Cruz v. New York City Health and Hosps. Corp.*, 188 AD3d 592, 593 [1st Dept 2020]; *Henry v. Duncan*, 169 AD3d 421 [1st Dept 2019]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on 'specifically cited evidence in the record.'" *Lowe v. Japal*, 170 AD3d 701, 703 [2d Dept 2019]. *See Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009].

Here, the Court finds that Defendants met their prima facie burden and showed that they did not depart from the standard of care or proximately cause Mr. Wilson's injuries. In his affidavit, Dr. Ellis details his opinion as to why Dr. Ostad did not depart from the standard of

care and explains the need to treat Mr. Wilson's lesion as soon as possible due to the metastatic potential of untreated Keratoacanthoma. Dr. Ellis also sufficiently opines that the Dr. Ostad properly performed the MMS procedure, took the proper precautions and properly closed the wound at the end of the surgery. Dr. Ellis explains his Dr. Ostad obtained proper informed consent and that he was not obligated to contact Mr. Wilson's PCP or cardiologist prior to the procedure. Dr. Ellis sufficiently proffers his opinion that Mr. Wilson's post-operative bleeding was caused by Mr. Wilson's failure to follow Dr. Ostad's orders by walking his dog after the surgery. With respect to Dr. Ostad's post-operative treatment of Mr. Wilson, Dr. Ellis details how there was no indication for Dr. Ostad to send Mr. Wilson to the ED prior to January 16th.

However, the Court also finds that Plaintiffs have sufficiently rebutted this prima facie showing via medical evidence demonstrating that Defendants departed from accepted medical practice and that such departure was a proximate cause of Mr. Wilson's alleged injuries. Based upon the affidavit of Plaintiffs' Expert, the Court finds that a material issue of fact exists as to whether Dr. Ostad departed from the standard of care in failing to contact Mr. Wilson's PCP and cardiologist to discuss how long Mr. Wilson would be required to take Brilinta, the nature of the surgical treatment and his medical history. The Court finds that there is an issue of fact particularly since Mr. Wilson told Dr. Ostad that his cardiologist and PCP recommended he wait to undergo the MMS until he was off the Brilinta. Plaintiffs' Expert also sufficiently details how Dr. Ostad should have held off performing the MMS until Mr. Wilson was off the Brilinta since the lesion "whether it was KA or SCC, did not require urgent treatment given that it was a new lesion with a very low work of aggressive local growth or metastasis if left untreated." An issue of fact also exists as to whether Dr. Ostad departed from the standard of care in his post-operative treatment of Mr. Wilson, including his placement of compression bandages on Mr.

Wilson's leg and his failure to to recommend Mr. Wilson go to the ED prior to January 16th. The Court notes that Plaintiffs' Expert failed to address the issue of informed consent and therefore the cause of action for lack of informed consent must be dismissed.

Therefore, except as to the cause of action for lack of informed consent, the Court hereby denies Defendants' motion for summary judgment dismissal of the Complaint as alleged against them.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss Plaintiffs' cause of action for lack of informed consent is hereby granted; it is further

ORDERED that the remainder of Defendants' motion for summary judgment is hereby denied; it is further

ORDERED that the Clerk of the Court shall enter the Judgment accordingly; it is further

ORDERED that any and all other requests for relief are hereby denied; and it is

ORDERED that the next Microsoft Teams Court Conference is scheduled for November 30, 2021 at 11 A.M.

Hon. Judith N. McMahon J.S.C.

11/8/2021
DATE

JUDITH REEVES MCMAHON, J.S.C.

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