

<b>Kapelyus v Pearlman</b>
2021 NY Slip Op 32823(U)
December 21, 2021
Supreme Court, Kings County
Docket Number: Index No 506965/2014
Judge: Ellen M. Spodek
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At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of December 2021

P R E S E N T:

HON. ELLEN M. SPODEK, Justice

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ARON KAPELYUS, as Administrator of the Estate of ISRAIL KAPELYUS, deceased  
Plaintiff,

-against-

CHARLES PEARLMAN, M.D., "JOHN or JANE DOE", RN, GOTTO MEDICAL CARE, P.C., BAY RIDGE ORTHOPEDIC ASSOCIATES, P.C., BROOKLYN COMMUNITY HOSPITAL, BROOKLYN COMMUNITY a/k/a NEW YORK COMMUNITY HOSPITAL, NEW YORK COMMUNITY HOSPITAL, and NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM,

Defendants.

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DECISION AND ORDER

Index No 506965/2014

*ms# 6 & 7*

Papers

Numbered

Notice of Motion/Cross Motion, Affirmation in Support and Exhibits	_____ 1-2 _____
Order to Show Cause, Affidavits Annexed, and Memorandum of Law	_____
Answering Affidavits in Opposition and Exhibits.....	_____ 3-4 _____
Replying Affidavits .....	_____ 5-7 _____
Exhibits .....	_____
Other .....	_____

Defendants CHARLES PEARLMAN, M.D., and BAY RIDGE ORTHOPEDIC ASSOCIATES, P.C. move pursuant to CPLR 3212 for summary judgment. Plaintiff

ARON KAPELYUS, as Administrator of the Estate of ISRAIL KAPELYUS, deceased, did not oppose this motion. Co-Defendants BROOKLYN COMMUNITY HOSPITAL, BROOKLYN COMMUNITY HOSPITAL a/k/a NEW YORK COMMUNITY HOSPITAL, and NEW YORK COMMUNITY HOSPITAL (collectively "NYCH") opposed the motion. Plaintiff moves pursuant to CPLR 3212(a) for an extension of time to move for summary judgment, and pursuant to CPLR 3212, for partial summary judgment against NYCH, which they opposed.

On February 1, 2021, the decedent, Israil Kapelyus, an 87-year-old male, presented to the Emergency Department at NYCH with a left hip fracture after falling at his home, Dr. Pearlman was the on-call doctor for trauma, and after examining Mr. Kapelyus, he determined that he had a 2/3 part intertrochanteric hip fracture, which required surgery. On February 2, 2012, Dr. Pearlman performed an open reduction internal fixation of the fracture with a three holed plate with one screw to secure the fracture.

On February 6, 2012, while Mr. Kapelyus was recovering from the surgery at NYCH, (where it was noted in the medical records he was a "fall risk"), he was taken to use the toilet where he was left unattended. He fell from the toilet and suffered a four-part hip fracture requiring additional surgery.

#### DISCUSSION

On a motion for summary judgment to dismiss a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp.*,

120 A.D.3d 1287 (2d Dept. 2014); *Stukas v Streiter*, 83 AD3d 18, 24-26 (2d Dept. 2011). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Brinkley v. Nassau Health Care Corp.*, supra; *Fritz v. Burman*, 107 A.D.3d 936, 940 (2d Dept. 2013); *Lingfei Sun v. City of New York*, 99 AD3d 673, 675 (2d Dept. 2012); *Bezerman v. Bailine*, 95 AD3d 1153, 1154 (2d Dept. 2012); *Stukas v. Streiter*, at 24. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff injury. *Contreras v Adeyemi*, 102 AD3d 720, 721 (2d Dept. 2013); *Gillespie v New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012); *Semel v Guzman*, 84 AD3d 1054, 1055-56 (2d Dept. 2011). The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas*, at 24.

DR. PEARLMAN AND BAY RIDGE ORTHOPEDIC ASSOCIATES, P.C.'s.

MOTION

Defendants Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C.'s motion was unopposed by the plaintiff. Defendant NYCH opposed the motion, however there were no cross claims filed by NYCH against Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C.. NYCH did not move for leave to amend to add any cross claims. The Court finds that NYCH lacks standing to oppose the summary judgment motion by Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C. While there is a lack of authority in New York State regarding standing of a co-defendant to oppose another defendant's

summary judgment motion when the plaintiff does not oppose the motion, and there are no cross claims, there are federal cases which discuss the issue. In *Blonder v. Casco Inn Residential Care, Inc.* 2000 WL 761895 (D. Me. May 4, 2000), the court discusses Federal Rule of Civil Procedure 56, which governs summary judgment motions, and finds that the rule “is intended to avoid trial when appropriate and to bring about summary justice whenever legally proper. Requiring Plaintiff to prosecute her claims against Defendants ....when she no longer believes such claims to be viable would be contrary to the principle of Rule 56 that trials (or portions thereof) should be avoided when appropriate. Requiring Defendants ....to endure such a trial would be contrary to the principle of Rule 56 that the Court should bring about summary justice whenever legally proper.” *Id.* at \*1. See also *Thurman v. Wood Group Production Services, Inc.*, 2010 WL 5207587, at \*1 (E.D.La. Dec.14, 2010); *Eckert v. City of Sacramento*, 2009 WL 3211278, at \*3 (E.D.Cal. Sept.30, 2009) While New York State courts are not governed by the Federal Rules of Civil Procedure, the rationale behind the rules for summary judgment in New York State are similar. To force a plaintiff to continue a trial against a defendant that they no longer believe they have a case against is wasteful of court resources and money. Co-defendant NYCH has cited no authority to support their standing to oppose the motion for summary judgment by Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C. Without standing to oppose the motion, the Court will not consider the opposition filed by NYCH. Therefore, the motion for summary judgment by Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C. is granted.

PLAINTIFF'S MOTION

Plaintiff moves pursuant to CPLR 3212(a) for an extension of time to move for summary judgment, and pursuant to CPLR 3212, for partial summary judgment against NYCH. A review of the court file shows that plaintiff filed their Note of Issue on December 14, 2018. Defendants subsequently moved to vacate the Note of Issue due to outstanding discovery or in the alternative extend the time to move for summary judgment to 120 days after discovery completion. This motion was denied by the court in an order dated , January 28, 2019, stating that the motions could be remade “before IAS judge pursuant to Brill & Miceli.” Discovery continued through 2019 and into November 2020, when the remaining deposition was completed. Defendants Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C. moved for summary judgment on November 20, 2020. Plaintiff did not file their motion for summary judgment until April 5, 2021.

Pursuant to CPLR § 3212(a), motions for summary judgment must be made within 120 days after the filing of the Note of Issue, except with leave of court on “good cause” shown. *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004); *Miceli v. State Farm Mutual Automobile Insurance Co.*, 3 NY3d 725, 726 (2004). Failure to satisfy the “good cause” requirement requires denial of the motion as a matter of law regardless of the merits or non-prejudicial nature of the motion. *Id.*

The Court finds that plaintiff has failed to provide good cause to grant an extension of time to move for summary judgment. Plaintiff filed their Note of Issue in 2018, acknowledging that there was outstanding discovery. Plaintiff filed a letter with the court dated October 27, 2020, stating that discovery was completed in the case and requesting a conference. Defendants Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C.

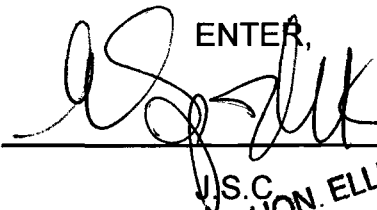
moved for summary judgment, unopposed by plaintiff, in November 2020. Plaintiff waited approximately 5 months to move for summary judgment after stating that discovery was complete. Plaintiff alleges that outstanding discovery is considered “good cause” for an extension of time to file a summary judgment motion. Assuming arguendo that the court would agree with that assertion, in this case, plaintiff waited almost 5 months after they stated that discovery was complete to move for summary judgment. Plaintiff contends that due to the Covid pandemic, his attorney and the attorney’s family contracted the disease, with plaintiff’s attorney not returning to work until the end of February. In addition, plaintiff’s attorney states that other members of his firm contracted Covid in January 2021. As a result, plaintiff argues that his attorney was unable to bring the motion any earlier. The Court finds this reliance on the pandemic and Covid to be disingenuous. While plaintiff’s attorney states that they are part of a small firm, the letterhead shows that plaintiff is not a solo practitioner but one of four attorneys in addition to seven attorneys listed as “Of Counsel”. The motion could have been filed in November or December 2020 prior to the Covid issues within the firm. Plaintiff could have sought an extension of time to move for summary judgment at the time that they filed the letter with the court requesting a conference. Instead they waited until April 2021 to file the motion. The Court finds this delay was not for “good cause” and pursuant to *Brill* the motion for summary judgment must be denied.

Assuming arguendo that plaintiff’s motion was timely made, the Court finds that there are issues of fact regarding the fall which would require the denial of summary judgment.

CONCLUSION

The motion for summary judgment by Dr. Pearlman and Bay Ridge Orthopedic Associates, P.C. is granted as unopposed. Plaintiff's motion is denied. The Clerk of the Court is directed to enter Judgment accordingly.

This constitutes the opinion, decision and order of the Court.

ENTER,  
  
U.S.C.  
HON. ELLEN M. SPODEK

KINGS COUNTY CLERK  
FILED  
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