

Katz v Feld
2021 NY Slip Op 32949(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 805262/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

-----X

NOGA KATZ,

Plaintiff,

- v -

BRITTANY FELD, P.T., and SPEAR PHYSICAL THERAPY,
PLLC,

Defendants.

-----X

INDEX NO. 805262/2019

MOTION DATE 08/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

In this action to recover damages for personal injuries, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

The plaintiff alleged in her complaint that, on March 30, 2019, she underwent physical therapy treatment, consisting of a cervical spine manipulation, that was provided by the defendant Brittany Feld, P.T., an employee of the defendant Spear Physical Therapy, PLLC (Spear). The plaintiff further alleged that, as a consequence of the treatment, she was caused to sustain a central disc extrusion that contacted the ventral spinal cord at the C5/C6 level, causing mass effect, cervical spinal cord compression, herniated nucleus pulposus, and radicular pain, disability, and dysfunction in the left arm and shoulder. In her bill of particulars, the plaintiff alleged that Feld departed from good and accepted medical practice by improperly manipulating the cervical area of her spine after failing to take a proper medical history, and directly causing the disc extrusion and herniated nucleus pulposus. She further asserted that these injuries caused ongoing pain in her neck and left arm.

In support of their motion for summary judgment, the defendants submit the affidavit of occupational and physical therapist Allison Weiner Lasher, DPT OTR/L, and the affirmation of neurologist Alexander Merkler, M.D.

Lasher asserted that she had reviewed all relevant medical and therapy records, as well as the transcripts of the parties' deposition testimony. She concluded that Feld did not depart from good and accepted physical therapy practice when treating the plaintiff, and that the therapy performed upon the plaintiff did not cause a disc herniation at C5/C6.

Specifically, Lasher averred that, at the time that the plaintiff first presented to Spear on December 15, 2018, she was already complaining of symptoms "consistent with a disc herniation," specifically, signs and symptoms of a C5/C6 disc herniation, which typically include pain in the neck, shoulder, and scapula, paresthesia of the lateral forearm, arm, and hand, and weakness upon shoulder flexion, shoulder external rotation, and shoulder abduction. Lasher concluded that

"it is clear this cervical disc herniation was present upon initial evaluation on 12/15/18 and worsened upon the plaintiff's increased physical activity level and participation in Krav Maga [martial arts], as evidenced by the Lenox Hill Emergency Department documentation. The C5C6 disc herniation was present upon initial evaluation as evidenced by radicular pain and weakness of the entire left upper extremity and was exacerbated during the plaintiff's Krav Maga session where her neck was twisted."

As Lasher recounted it, the plaintiff had reported having engaged in a Krav Maga martial arts session in November 2018, at which she had been thrown to the ground, resulting in complaints of "pain in her left shoulder and collar bone [and] sternoclavicular joint (in the shoulder)" that "progressed to include the upper trapezius muscle, elbow region and tingling to left hand." Lasher noted that the plaintiff initially underwent eight sessions of physical therapy at the Spear offices between December 15, 2018 and January 30, 2019. As Lasher explained it,

"[o]n 1/30/19, in addition to the above complaints, the plaintiff complained of vertigo and dizziness during a sit to/from supine transfer. Plaintiff stated that the symptoms began when she had returned to Krav Maga two weeks prior. She stated that she had these symptoms with all bed mobility the morning after the

Krav Maga session two weeks prior. In the Lenox Hill Emergency Room notes on 1/30/19, Dr. Huang noted that the plaintiff reported twisting her neck in a class and dizziness, vertigo and nausea commenced. This neck twisting event seems to have worsened the cervical symptoms that were already present at that time.”

Crucially, Lasher noted that the plaintiff

“returned to Spear to focus on her left upper extremity/shoulder complaints in March 2019 and underwent 3 additional treatments prior to the 3/30/19 PT treatment in issue. The plaintiff’s 3 additional treatment sessions that took place prior to 3/30/19 were on 3/15/19, 3/19/19, and 3/26/19. On 3/15/19, the physical therapist documented that the plaintiff had a painful end range of motion to her left shoulder and continued with muscle tightness in the left upper trapezius, levator scapulae and pectoralis region. On 3/19/19, the therapist documented that the plaintiff continued to have left shoulder pain and left scapula and left rotator cuff weakness. The therapist stated that the plaintiff still presented with a painful range of motion of the left upper extremity. On 3/26/19, the therapist stated that the plaintiff responded well to a suboccipital release as she presented with significant muscle guarding in the cervical region. The therapist also stated that the plaintiff continued to present with weakness and decreased stability of the left upper extremity.”

Lasher explained that the treatment that Feld rendered to the plaintiff on March 30, 2019 involved “one exercise and manual treatment in the upper left shoulder region while the plaintiff was in the prone position on the treatment table.” Lasher conceded that the plaintiff, at her deposition, claimed otherwise, namely, that Feld aggressively manipulated the cervical region of her spine, but Lasher opined that, even if the treatment were as the plaintiff described it, such treatment “could not have caused the plaintiff’s C5/C6 [disc] to herniate.” Lasher went on to state that the plaintiff’s had already “endured” 11 prior therapy sessions, which focused on “soft tissue massage and release to the left upper trapezius muscle, left scalene muscle, left levator scapulae muscle and suboccipital region,” as well as “cervical, thoracic and rib mobilizations and glides” that were “in no way different” from the treatment rendered on March 30, 2019. Lasher further noted that there was no cervical spine imaging between November 19, 2018 and March 30, 2019 that might have revealed the existence of a disc herniation, but that the May 2019 MRI that first revealed the existence of the herniation reflected an injury that the plaintiff had sustained in November 2018.

In his affirmation, Dr. Merkler reiterated most of the medical history recounted by Lasher, and opined that

“the manipulation, even if it occurred just as the plaintiff described, did not cause the plaintiff’s C4/C5 or C5/C6 bulges/extrusions because (1) the plaintiff already had signs and symptoms of C4/C5 and C5/C6 disc bulges/extrusions and nerve impingement on 12/15/18; and (2) the maximum amount of force that could have been applied by the manipulation is insufficient to lead to a disc herniation.”

He explained that disc extrusions or herniations result from trauma, but only where the trauma is of “high velocity, of significan[t] force, or of signfica[nt] rotation” and, hence, the disc herniations reported by the plaintiff “were likely either due to degenerative spinal disease and/or a rotational trauma” sustained during her November 2018 martial arts session. In summary, Dr. Merkler concluded that

“the disc bulges and extrusions identified on the cervical MRI on 5/3/19 are unrelated to the March 30, 2019 manipulation. The plaintiff had symptoms of cervical radiculopathy that pre-dated on the March 30, 2019 manipulation. Had the plaintiff been imaged prior to March 30, 2019, the same disc bulges/ extrusions would have been identified.”

In opposition to the defendants’ motion, the plaintiff relied upon, inter alia, the affirmation of a doctor of osteopathy who specializes in physical medicine and rehabilitation. He opined that Feld departed from good and accepted medical practice in undertaking a manipulation of the cervical region of the plaintiff’s spine on March 30, 2019, and that the departure caused the plaintiff to sustain injuries, specifically, a disc herniation at the C5/C6 level.

The plaintiff’s expert explained that, on December 14, 2018, when the plaintiff first presented to Spear, she complained of an “injury to her clavicle.” The expert noted that, in the plaintiff’s registration papers for Spear’s office, the plaintiff reported that she had sustained a “collarbone injury” in response to the inquiry concerning the “injury to be treated,” and never reported having had any particular issue or problem with her neck. The expert interpreted the plaintiff’s entries in her registration form as indicating a collarbone injury as her primary complaint, with pain and discomfort radiating to her shoulder, arm, neck, and trapezius. The plaintiff’s expert further noted that the plaintiff’s primary care physician had referred her to Lenox

Hill Radiology prior to the plaintiff's treatment with Spear, and that, in a radiology report dated December 6, 2018, an x-ray was taken to assess the cause of a clavicle injury and resultant pain. In addition, the expert reported that, prior to that x-ray, the plaintiff had not made any complaints of neck pain or pain to the cervical region of her spine to either of the primary-care physicians who examined her in early December, nor to the physicians who examined her at the Lenox Hill Hospital (LHH) emergency room on January 30, 2019; neither, according to the expert, did the plaintiff complain to any personnel at Spear during the course of her treatment there that she was experiencing problem with or pain in her neck. As the expert explained it, the plaintiff

“was referred for left shoulder pain after a left collar bone/sternoclavicular joint injury which progressed to include upper trapezius, shoulder and tingling in the left hand. There is no mention of any neck pain nor is there any reference to any neck or cervical spine/disc issues by Spear on this date. In fact, there is never any mention by any healthcare provider at Spear for any suspicion of any neck or cervical spine/disc issues at any time from 12/15/18 thru 3/30/19.”

The expert thus concluded that the plaintiff's symptomatology was due to a shoulder injury or shoulder impingement syndrome, and was not a definitive indication of a cervical disc injury.

The expert wrote that

“the records from the LHH ER not only fail to document any neck pain or related disc symptomatology, the physicians in the ER at LHH did not even have a ‘rule out’ diagnosis as to any cervical disc disease as, while they did order a CT of the brain and a CT angiogram of the brain and the neck, they did not order any imaging studies of the Plaintiff's cervical spine to rule out/rule in any cervical disc disease issue. It is my opinion that on 1/30/19 at the LHH ER the Plaintiff was not exhibiting any signs of neck pain or any other symptomatology attributable to any cervical disc disease nor did the doctors at the LHH ER have any suspicion of cervical disc disease at that time as evidenced by the lack of any investigation for any cervical disc condition.”

The expert went on to opine that, inasmuch as the plaintiff did not complain of neck pain at any of her appointments with Spear up to and including her March 26, 2019 appointment, and an orthopedist that she saw on March 11, 2019 did not note any problem with the plaintiff's cervical spine, no cervical injury had occurred up to that point, and the injury was caused by the overly aggressive spinal manipulation performed on March 30, 2019. He concluded that all of the

plaintiff's complaints up to March 30, 2019 were directly related solely to shoulder impingement syndrome, shoulder strain, and, more likely, "a trigger point in the shoulder girdle musculature causing radiating pain, etc., that were the result of the Plaintiff's reported collarbone injury and twisted neck occurrence in January 2019" during a martial arts class.

The plaintiff's expert further commented that

"[w]hile defendant Feld testified that she did not apply pressure or push down on the Plaintiff's cervical neck area while the Plaintiff was in a prone position and 'never touched the top of her neck' or ' . . . the cervical spine area,' defendant Feld testified that the exercises that are listed in the Spear records for 3/30/19 as having been performed by her are not accurate and that all of the entries in the intervention section for that date are inaccurate and were not performed by Feld."

Conversely, the expert adverted to the plaintiff's unambiguous deposition testimony, in which the plaintiff asserted that she was "lying on the table, face forward . . . lying on my stomach, she [Feld] was pressing on my spine close to my head." The plaintiff further testified that "I was in a lot of pain when she was pressing" and said "ouch, aya. It hurt. I made noises. It was very painful" and that Feld "did this thing until the end of the session. She continued to press very, very hard on my bones through the entire session," after which the plaintiff "felt very weird in my neck" and that the "the type of pain I felt after was completely different, because it was not in the muscle. It was like deep inside in the back of the neck, like inside. So, it was completely different and quite worrisome. And it was a pain that I have never experienced before." The plaintiff testified that "the following day, that was Sunday, I was crying. Like I was just like in a crazy amount of pain." The expert noted that, in response to the March 30, 2019 treatment, the plaintiff presented to an urgent care center the very next day complaining of neck pain, and then approximately one week later to Drs. Craig Antell and John Bendo, who are, respectively, a physiatrist and an orthopedist, complaining of the same condition.

The expert concluded that the plaintiff did not sustain a cervical disc injury until the "negligent physical therapy manipulations performed by the defendant Feld on 3/30/19," which the expert characterizes as a "trauma." The expert also discounted the defendants' experts'

contention that degenerative disc disease may have caused the plaintiff's cervical injuries. He thus opined, in effect, that cervical manipulation was not indicated as a treatment for the plaintiff's condition in the first instance, and that the manipulation was improperly performed, thus causing the plaintiff's cervical injuries.

It is well settled that the movant on 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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see

Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (see *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (see *Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify “in what way” the patient's treatment was proper and “elucidate the standard of care” (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must “explain ‘what defendant did and why’” (*id.*, quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a 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 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakobowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Consequently, where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24 *Cruz v St. Barnabas Hospital*, 50 AD3d 382 [1st Dept 2008]).

The defendants established their prima facie entitlement to judgment as a matter of law by virtue of their experts' opinions that the plaintiff had sustained a cervical injury prior to the March 30, 2019 physical therapy session, that the manipulation performed on that date was

properly undertaken, and that the treatment did not cause a herniation. In opposition to that showing, however, the plaintiff raised a triable issue of fact with her expert's affirmation, in which he sharply disputed the conclusion that the plaintiff had sustained a cervical injury prior to March 30, 2019, and opined that the manipulation was improperly and over-aggressively performed, thus causing the cervical herniations that the plaintiff complains of. Hence, the defendants' motion for summary judgment must be denied.

In light of the foregoing, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the court.

12/22/2021
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: