

Khan v New York City Health & Hosps. Corp.

2022 NY Slip Op 32609(U)

July 29, 2022

Supreme Court, New York County

Docket Number: Index No. 805214/2019

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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MOHAMED KHAN

Plaintiff,

- v -

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Defendant.

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INDEX NO. 805214/2019

MOTION DATE 01/06/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and oral argument held before this court on June 22, 2022, the court grants Defendant New York City Health & Hospitals Corporation’s (“Defendant”) summary judgment motion to dismiss Plaintiff Mohamed Khan’s (“Plaintiff”) complaint.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendant regarding Defendant’s alleged negligent care and treatment of Plaintiff at Bellevue Hospital Center from August 12, 2018 to August 17, 2018. Plaintiff severely injured the middle finger, which was almost completely severed, and cut his index finger on his left hand on August 12, 2018, due to an electric saw accident. Defendant’s hand surgical team performed emergency surgery to repair Plaintiff’s injuries, which included injuries to his skin, bones, tendons, nerves and vasculature in the middle finger, requiring pins. Defendant’s team was ultimately successful in preventing the amputation of Plaintiff’s middle finger.

Post-surgery, Plaintiff's arm was placed in a Carter block and he received Marcaine through an infraclavicular block catheter. Plaintiff was discharged from the hospital on August 17, 2018, and received follow-up treatment at Bellevue's hand clinic. On September 7, 2018, Plaintiff developed a claw deformity in his left fourth and fifth fingers and he had no sensation in his ulna¹ nerve distribution. On October 1, 2018, an electrodiagnostic study revealed that Plaintiff had ulnar neuropathy at or around his left elbow. On October 12, 2018, Plaintiff's pins were removed from his left middle finger. Subsequently, it was revealed that he had symptoms of ulna nerve denervation. On December 18, 2018, Plaintiff had left cubital tunnel release surgery to decompress the ulna nerve about his elbow.

Plaintiff alleges in substance that Defendant departed from good and accepted medical practice by failing to properly perform the surgery, failing to identify and protect the ulna nerve and failing to safely position Plaintiff's left hand and arm pre-operatively, operatively and post-operatively, causing excessive compression on Plaintiff's ulna nerve and ulnar neuropathy, among other alleged departures. In a supplemental bill of particulars filed on July 30, 2021, Plaintiff further alleged in substance that Defendant's employees were careless and negligent by improperly positioning Plaintiff's arm during surgery with undue pressure over the ulna nerve at the elbow, by continuing immobilization and elevation in the Carter block with undue pressure over the nerve again in an insensate arm with nerve block for continuous 48 hours, by improperly positioning Plaintiff's left hand and arm post-operatively resulting in compression injury of the ulna nerve, in failing to protect Plaintiff's left ulna nerve from injury and in failing to advise Plaintiff of all risks, hazards and dangers, including that of permanent nerve damage to his left arm, and the alternatives to continuous nerve block for pain management.

¹ Although there are distinct medical differences in the correct use of the terms "ulna" and "ulnar," the parties appear to use them interchangeably at times.

Defendant now moves under motion sequence 001 for summary judgment in its favor and for dismissal of Plaintiff's complaint. Defendant relies on the expert affirmations of Dr. Evan Fischer and James Eisenkraft. Defendants argue in substance that there was no deviation from accepted standards of medical practice prior to, during, or subsequent to Plaintiff's surgery and that there was nothing that any of Defendant's employees or agents did or failed to do which was a proximate cause of Plaintiff's alleged ulnar neuropathy and other injuries. Defendant further argues in substance that Plaintiff's ulnar neuropathy did not develop until 26 days after his surgery and 20 days after his release from the hospital and if it was caused by the Defendant, then it's symptoms would have appeared much earlier. Defendant also argues that Plaintiff's ulnar nerve and elbow were not compressed during the surgery or post-surgery when Plaintiff's arm was positioned in the Carter block. Additionally, Defendant argues in substance that the anesthesia used during the surgery and the continued localized analgesia used after the surgery administered through an infraclavicular brachial plexus nerve block met the standard of care and did not cause Plaintiff's ulnar neuropathy.

Defendant further argues that Defendant's surgical team obtained Plaintiff's informed consent prior to the procedure and that Plaintiff was warned of the risks of the procedure, including the need for additional surgeries, that the revascularization would not be successful, that revision amputation may be necessary and that he may have permanent stiffness and difficulties moving his fingers and hand.

Plaintiff opposes the motion and relies on his own expert's affirmation, whose name was redacted. Plaintiff argues in substance that Defendant failed to establish a prima facie case of its entitlement to summary judgment in its favor as a matter of law and issues of fact remain to be tried regarding Defendant's claim that its post-operative care of Plaintiff was not the proximate

cause of Plaintiff's ulnar nerve injury. Plaintiff argues that his expert disagrees with Defendants' experts, which is sufficient to defeat Defendant's motion. Plaintiff's expert opines in substance that Defendant's post-surgical departures began on August 13, 2018 until Plaintiff was discharged from Bellevue on August 17, 2018, and that Defendant's surgical team failed to properly protect Plaintiff's left arm to prevent injury to his ulnar nerve. Plaintiff's expert alleges that Defendant deviated from the accepted standard of care by improperly placing Plaintiff's arm in the Carter block for several days without properly protecting his elbow which caused compression injury to the ulnar nerve. Plaintiff's expert further states that Defendant should have placed a donut-shaped pad underneath Plaintiff's elbow or altered the Carter block with a cut out to relieve the pressure on the elbow. The expert also stated in substance that Defendant deviated by administering the Marcaine continuously through the infraclavicular catheter during Plaintiff's post-operative care because, although Plaintiff's arm may not have been completely insensate, it was paralyzed, with decreased sensation and without protective sensation. Therefore, Plaintiff argues that Plaintiff could not sense the compression of his ulnar nerve.

Plaintiff further argues in substance that there are discrepancies with Defendant's arguments regarding when the symptoms of Plaintiff's ulnar neuropathy began. Plaintiff testified in substance that he believed that he had numbness in his entire left arm beginning on August 15, 2018, until he was discharged. Additionally, after his discharge, Plaintiff argues that there are questions of fact as to whether Defendant's doctors tested all of Plaintiff's fingers to determine whether he had sensation.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New*

York, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, 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 Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's

ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment” (*id.*).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendant established its prima facie entitlement to judgment in its favor as a matter of law and Plaintiff failed to raise any material issues of fact based upon admissible evidence to defeat this motion.

As an initial matter, the court considers the merits of Plaintiff’s expert’s affirmation and finds Plaintiff’s expert to be competent to opine on the issues in this case. Additionally, the court finds that Plaintiff’s arguments regarding the alteration of the Carter block or use of the donut-shaped pillow are not impermissible new theories of liability raised for the first time in opposition to the motion, but permissible arguments which specify examples of Plaintiff’s previous allegations that Defendant deviated from accepted standards of care by failing to protect Plaintiff’s ulnar nerve and failing to relieve the undue pressure over the ulnar nerve at the elbow. Also, it appears that Plaintiff has abandoned his allegations of Defendant’s departures occurring prior to and during Plaintiff’s surgery and Plaintiff focused solely on the post-operative period during Plaintiff’s hospital admission. Therefore, Plaintiff failed to dispute Defendant’s claims that there were no departures prior to the surgery or during the surgery.

Although Plaintiff alleges in substance that issues of fact necessarily exist because his expert disagrees with Defendants’ experts regarding Defendant’s negligent post-operative care of

Plaintiff and the proximate cause of Plaintiff's ulnar nerve injury, the court agrees with Defendant and finds that Plaintiff's expert affirmation is insufficient to raise material issues of fact. The court determines that Plaintiff's expert failed to sufficiently detail how Defendant's failure to use a donut-shaped pillow or an altered Carter block with a cut out underneath Plaintiff's elbow to relieve the pressure on the ulna nerve was a departure from the accepted standard of medical practice at the time of Plaintiff's post-operative treatment. Defendants demonstrated that the use of the Carter block without alteration and use of nerve block in this manner were within the normal course of post-operative treatment and where commonly used in an effort to keep the hand elevated, reduce the swelling, manage the pain and facilitate healing. Defendant's expert had never seen a Carter block altered and used in the manner suggested by Plaintiff's expert. The court finds that it is simply insufficient for Plaintiff to allege that Defendant failed to protect Plaintiff's ulnar nerve and failed to prevent the injury to the ulnar nerve without stating what the applicable standard of care was and how the use of such pillow or alteration was within that standard of care. Plaintiff failed to do so and thus, failed to dispute the evidence in support of Defendant's arguments that there were no departures from the accepted standard of care.

Furthermore, Plaintiff failed to raise any material factual issues to dispute Defendant's claims that Plaintiff's alleged injuries were not a known risk of the surgery or type of treatment provided to Plaintiff. Also Plaintiff failed to adequately dispute based on admissible evidence that Defendant's surgical team had no duty to advise Plaintiff of any risks, hazards and dangers regarding the potential for permanent nerve damage to Plaintiff's left arm, or the alternatives to continuous nerve block for pain management. Additionally, Plaintiff failed to sufficiently allege that if he had been advised of such risks and alternatives, then he would not have chosen to have


the surgery to save his finger or to undergo the same type of post-operative treatment. Therefore, Plaintiff's lack of informed consent claim must also fail.

Since the court finds that Plaintiff failed to raise issues of fact regarding liability on his medical malpractice and lack of informed consent claims, it does not matter whether he raised a question of fact regarding proximate causation. However, the court agrees with Defendant and finds that Plaintiff's expert's opinion regarding proximate causation is speculative, conclusory and often contradicted by the evidence. Defendants demonstrated that there is no evidence that Plaintiff's ulna nerve injuries were caused by this type of post-operative treatment and Plaintiff's expert failed to cite to any examples where such injuries were caused by such treatment.

Therefore, the court grants Defendant's summary judgment motion and dismisses Plaintiff's complaint as against Defendant without costs.

The court considered any additional arguments raised by the parties, but not specifically addressed herein and the court denies any additional requests for relief not expressly granted herein.

This constitutes the decision and order of the court.


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<u>7/29/2022</u> DATE			<hr/> ERIKA EDWARDS, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE