SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOSEPH CRISTIANO, by the Administrator of his Estate, MARIANNA CRISTIANO and MARIANNA CRISTIANO, Individually,

Plaintiff,

- v -

MICHAEL SACCA, M.D., GARRI PASKLINSKY, M.D., PAVAN J. DALAL, M.D., ANNIKA MARGUERITE MEYER, M.D., SUNG Y. KIM, M.D., GOOD SAMARITAN HOSPITAL, and THE MOUNT SINAI HOSPITAL,

Defendants.

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INDEX NO. 805333/2016

MOTION DATE 06/27/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 140, 142

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

In this action to recover damages for medical malpractice based on departures from good and accepted practice, lack of informed consent, and wrongful death, the defendant Garri Pasklinsky, M.D., moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiff does not oppose the motion. The motion is granted.

The crux of the plaintiff's claims in this action is that, in June 2015, her decedent, Joseph Cristiano, was suffering from a pseudoaneurysm that should have been diagnosed on a computed tomography angiogram (CTA) scan, but was not identified, and thus remained untreated. She asserted that the defendants' failure timely to diagnose and treat the pseudoaneurysm permitted the adverse effects of that condition to deteriorate, causing her decedent to sustain an abdominal aortic aneurysm rupture in August 2015 that eventuated in his death.

In support of his motion, Pasklinsky submitted the pleadings, the plaintiff's bill of particulars, the transcripts of the parties' depositions, and relevant medical and hospital records. He established his prima facie entitlement to judgment as a matter of law with those documents, as well as the expert affirmations of board-certified vascular surgeon Steven Friedman, M.D., and board-certified diagnostic radiologist Kevin Mennitt, M.D. Both of those experts opined that Pasklinsky did not depart from good and accepted practice in treating the plaintiff's decedent in the course of a December 24, 2014 aorto-femoral bypass procedure at the defendant Good Samaritan Hospital, in which Pasklinsky served as an assistant surgeon to primary vascular surgeon Michael J. Sacca, M.D. They also concluded that Sacca, who was the sole physician responsible for obtaining the decedent's fully informed consent to the procedure, did in fact obtain qualitatively sufficient consent. Drs. Friedman and Mennitt further asserted that Pasklinsky met the standard of care for post-operative treatment in December 2014, and in connection with a consultation on May 4, 2015, subsequent to what was likely a small stroke that the decedent had suffered in mid-April 2015.

Dr. Friedman opined that the December 24, 2014 surgery was "entirely indicated" in order to revascularize the decedent's lower extremities, that the surgery was performed in a technically proficient manner as described in the operative report, and that the procedure was completed in accordance with good and accepted practice, with no complications or untoward intraoperative events. He noted that a December 28, 2014 CTA of the abdomen and pelvis reflected that the bypass graft was "patent," that is, unobstructed. Dr. Friedman also concluded that Sacca, as the primary surgeon, obtained the decedent's consent, and that Pasklinsky, as the assistant surgeon, thus was not obligated to do so, but that the consent was qualitatively sufficient in any event. Dr. Friedman also noted that it was Sacca, and not Pasklinsky, who determined to employ a CryoLife cadaver graft rather than a prosthetic graft, but that, in any event, the determination to employ a biologic graft was "a reasonable exercise of medical judgment and in accordance with the standard of care."

As Dr. Friedman described it, Pasklinsky's contacts with decedent were limited in scope to assisting Sacca during the December 24, 2014 surgery, seeing the decedent postoperatively on December 26, 2014, and consulting on with the decedent on May 4, 2015 during the decedent's next admission to Good Samaritan Hospital. He explained that

> "[o]n 12/26/14, two days after the surgery, Dr. Pasklinsky saw decedent in the ICU and noted bilateral lower extremity weakness. His vitals were stable and physical exam was unremarkable. He noted that decedent was stable, that he was on a clear liquid diet, that he should ambulate with PT, be out of bed and weight bear as tolerated, and continue care per the ICU team. It is my opinion, within a reasonable degree of medical certainty, that his care on that day, including the assessment and plan, was entirely appropriate and in accordance with the standard of care.
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> "Dr. Pasklinsky's third and final contact with decedent was when he consulted on 5/4/15 during the next admission when decedent presented with altered mental status. On exam, decedent's distal lower extremity pulses were audible bilaterally. The left groin had a punctate opening with purulent drainage. He was afebrile and his vitals were stable. His WBC was 7.8. Dr. Pasklinsky's impression was that decedent was status post aorto-bifemoral bypass, now with purulent drainage from the left groin, but no cellulitis. The plan was for antibiotics per ID, a CT of the aorta with runoff to evaluate the extent of the left groin collection and its proximity to the graft, for a carotid duplex scan, and dry dressings to the groin. It is my opinion, within a reasonable degree of medical certainty, that his care on that day, including the assessment and plan, was entirely appropriate and in accordance with the standard of care."

Dr. Friedman explained that the three subsequent CTA scans relevant to the decedent's treatment post-dated Pasklinsky's last involvement with the decedent, and that none of the CTA imaging that Pasklinsky reviewed reflected any abnormalities in the area of bifurcation, distal to the graft, where an August 2015 scan at Plainview Hospital evinced an anterior disruption.

Dr. Mennitt opined that Pasklinsky properly read the December 28, 2014 CTA imaging that was obtained at Good Samaritan Hospital, and agreed with the post-operative reports that it revealed a patent aortoiliac bifemoral graft. Dr. Mennitt noted that, while that imaging also demonstrated the presence of some free fluid, approximately two centimeters proximal to the graft, the free fluid was not a pseudoaneurysm, as it was not encapsulated, and there was no active bleeding. Hence, he concluded it was simply free fluid constituting a normal post-operative finding. Dr. Mennitt further asserted that the May 6, 2015 CTA imaging reflected the

presence of the same free fluid as was depicted on the earlier CTA, and that the fluid "was not a pseudoaneurysm as there was no contrast within it and there was no connection between the fluid collection and any vessel." Although Pasklinsky's involvement in the decedent's case apparently terminated on May 4, 2015, Dr. Mennitt opined that, in any event, a June 4, 2015 CTA image obtained at Mount Sinai Hospital essentially duplicated the May 6, 2015 imaging, while an August 20, 2015 CTA image obtained at Plainview Hospital "showed a disruption at the anterior aspect of the bifurcation, where there were no prior abnormal findings at all, distal to the graft," but that the disruption was also "distal to where the stable, encapsulated fluid collections were seen." He thus concluded that none of the CTA images depicted a pseudoaneurysm. Dr. Mennitt concluded that

> "there was nothing at the bifurcation seen on the prior imaging that was abnormal and that would have raised even an indicia of suspicion for an impending disruption. It is also my opinion, within a reasonable degree of medical certainty, that there is no evidence or indication that the aforementioned fluid collections, located proximal to the graft, had any causative effect or relationship to the disruption at the bifurcation, located distal to the graft."

The plaintiff did not oppose Pasklinsky's motion.

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 its 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 (s*ee 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 its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense (s*ee 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]). Where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment proximately causing injury, he or she will be deemed to have departed from good and accepted medical practice (*see Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *see Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Medical Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

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 Jakubowitz*, 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).

Pasklinsky established his prima facie entitlement to judgment as a matter of law with his expert affirmations, in which his retained experts explained why he did not depart from good and accepted medical practice in assisting with the December 24, 2014 surgery, in consulting with the decedent on December 28, 2014, and May 4, 2015, and in interpreting the CTA imaging that was available to him up to that date, after which he no longer was involved in the decedent's care. By failing to oppose Pasklinsky's motion, the plaintiff failed to raise a triable issue of fact. Hence, summary judgment must be awarded to Pasklinsky dismissing the medical malpractice cause of action insofar as asserted against him.

The elements of a cause of action for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the

> treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless. a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In any event, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d at 456), and that invasion or disruption is claimed to have caused the injury.

Pasklinsky made a prima facie showing that Sacca obtained a qualitatively sufficient consent from the decedent to undertake the December 24, 2014 surgery. He further established that both the plaintiff's medical malpractice claim and her lack of informed consent claim against him did not involve the surgery itself, but only his alleged failure to diagnose a pseudoaneurysm, and his concomitant delay in initiating proper treatment. Pasklinsky thus demonstrated that the lack of informed consent cause of action against him did not implicate any invasion or disruption of bodily integrity. Since the plaintiff submitted no opposition to

Pasklinsky's motion, she failed to raise a triable issue of fact, and Pasklinsky must be awarded summary judgment dismissing cause of action to recover for lack of informed consent insofar as asserted against him.

In light of the foregoing, it is

ORDERED that the motion of the defendant Garri Pasklinsky, M.D., for summary judgment dismissing the complaint insofar as asserted against him is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendant Garri Pasklinsky, M.D.; and it is further,

ORDERED that the action against the defendant Garri Pasklinsky, M.D., is severed; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Garri Pasklinsky, M.D.

This constitutes the Decision and Order of the court.

9/20/2022
DATE

JOH J. KE EY, J.S.C.

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