

**Yashar v North Shore Univ. Hosp.**

2022 NY Slip Op 34698(U)

May 26, 2022

Supreme Court, Queens County

Docket Number: Index No. 703416 2016

Judge: Peter J. O'Donoghue

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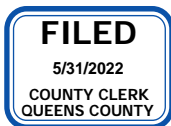
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD  
Justice

MAHROKH YASHAR,

Plaintiff  
-against-



x Inde  
Number 703416 2016  
Motion  
Date February 16, 2022

NORTH SHORE UNIVERSITY HOSPITAL, et. al. Motion Seq. No. 4  
Defendants

X

The following papers read on this motion by defendant North Shore University Hospital (NSUH) for an order granting summary judgment dismissing the complaint with prejudice.

Papers  
Numbered

Notice of Motion-Affirmations-Affidavit-Exhibits-Statement of	
Material Facts-Memorandum of Law.....	EF 164-197
Opposing Affirmations - Exhibits.....	EF 200- 203
Reply Affirmation-Exhibit.....	EF 205

Upon the foregoing papers this motion is determined as follows:

Plaintiff Mahrokh Yashar commenced the within action on March 3, 2016 and alleges causes of action against NSUH for medical malpractice and for lack of informed consent. On September 28, 2013, plaintiff was walking along a road with her sister, when she was struck from behind by a hit and run driver. At approximately 6:05 p.m. that evening Ms. Yashar was transported to the NSUH Emergency Department (ED) by ambulance. She was admitted to said hospital on September 28, 2013 and remained a patient at said hospital until her discharge on December 9, 2013. Plaintiff in her bill of particulars alleges that NSUH's staff negligently intubated or failed to properly intubate plaintiff; that they negligently

allowed, caused and/or permitted prolonged intubation; that they failed to appreciate the significant risks associated with prolonged intubation; that they failed to properly and timely extubate; that they failed to properly and timely perform a tracheotomy; that they negligently allowed, caused and/or permitted reintubation; that they negligently allowed, caused and/or permitted nerve damage resulting in bilateral vocal fold paralysis and/or paresis; that they failed to properly and timely communicate with other healthcare providers rendering services to plaintiff; that they failed to properly and timely formulate an appropriate treatment plan; that they failed to obtain necessary consultations in a timely fashion; that they failed to comply with and abide by hospital rules, regulations, policies and procedures; that they failed to promulgate and/or enforce reasonable rules, regulations, policies and procedures and failed to devote sufficient time, attention and skill to the care and treatment of plaintiff; that they failed to supervise the medical services rendered to plaintiff; and negligent hiring.

Plaintiff alleges to have sustained injuries that include bilateral vocal fold paralysis and/or paresis; voice disorder; difficulty swallowing; respiratory distress; prolonged intubation; vocal cord damage and dysfunction; dysphagia; traumatic intubation; tracheostomy tube dependence; recurrent laryngeal nerve damage; prolonged intubation and consequences thereof; discordinated (sic) swallow; need for permanent tracheostomy; difficulty breathing; difficulty eating; vagus nerve damage; and increased aspiration, pneumonia and risk of choking on food.

Defendant NSUH served a verified answer and interposed 9 affirmative defenses.

At the outset, contrary to plaintiff's assertions, defendant NSUH's motion for summary judgment was timely served. Plaintiff filed a note of issue on October 3, 2018, which was vacated on February 24, 2020, and the action reverted to pre-note status. Pursuant to a so-ordered stipulation dated September 27, 2021, the matter was restored to the calendar and plaintiff was directed to file a note of issue no later than October 6, 2021, a conference was to be held on December 16, 2021 and the parties were to appear for jury selection on January 10, 2022. Plaintiff filed her notice of issue on September 29, 2021. Despite plaintiff's counsel's claim, NSUH was not required to seek an extension of time in which to file a motion for summary judgment, as the time in which to so move ran from the filing of the note of issue on September 29, 2021. The within motion for summary judgment was timely e-filed on November 15, 2021 (*See* CPLR 3212[a]).

The parties herein entered into stipulations to discontinue the within action, with prejudice, as to all named defendants with the exception of NSUH and the John Doe defendant, who is intended to be the physician whose signature appears on an anesthesia note dated October 12, 2013 at 12:01. With respect to Drs. Underwood, Bholat, Bagdonas, Bank and Kadakde, defendant NSUH stipulated that if there is a finding of liability at trial with

respect to any care and treatment rendered to plaintiff from September 28, 2013 through December 9, 2013, by said physicians that was within in the scope of their employment by NSUH, then NSUH would be vicariously liable for said care and treatment.

On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries (*See Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863, 864 [2d Dept 2021]; *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 [2d Dept 2021]; *Elstein v Hammer*, 192 AD3d 1075, 1076 [2d Dept 2021]; *Roca v Perel*, 51 AD3d 757, 758-759 [2d Dept 2008]). If the defendant makes such a showing, the burden shifts to the plaintiff to raise a triable issue of fact as to those elements on which the defendant met its prima facie burden of proof (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d Dept 2019]). Generally, summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see Elstein v Hammer*, 192 AD3d at 1077; *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (*see Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d at 864; *Elstein v Hammer*, 192 AD3d at 1077; *Wagner v Parker*, 172 AD3d 954, 955 [2d 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” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d at 759). On a motion for summary judgment, the party opposing the motion is entitled to every favorable inference that may be drawn from the pleadings and affidavits submitted by the parties (*see Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Ctr.*, 186 AD3d 1426, 1427 [2d Dept 2020]).

Defendant NSUH in support of the within motion submits, among other things, the affirmation of its medical experts, Dr. Hooman Poor, a physician licensed to practice medicine in the State of New York and board certified in pulmonary medicine, internal medicine and critical care medicine, and Dr. Wayne Koch a physician licensed to practice medicine in the State of Maryland and board certified in otolaryngology. Drs. Poor and Koch each set forth a detailed account of the plaintiff's care and treatment by defendant NSUH based upon a review of the bills of particulars, available medical records, expert disclosures, deposition testimony, and relevant medical literature. Drs. Poor and Koch each opine, with a reasonable degree of medical certainty, that NSUH's staff, including the critical care team, did not depart from the good and accepted standards of medicine, and that no act or omission by any NSUH staff was a substantial factor in causing injury to the

plaintiff, and specifically rebuts each allegation made in plaintiff's bill of particulars, including the claims of lack of informed consent, negligent supervision and negligent hiring (*See Pirri-Logan v Pearl*, 192 AD3d 1149 [2d Dept 2021]; *Gilmore v Mihail*, 174 AD3d 686, 687 [2d Dept 2019]; *Khosrova v Westermann*, 109 AD3d 965, 966 [2d Dept 2013]; *Andreoni v Richmond*, 82 AD3d 1139, 1139 [2d Dept 2011]).

Plaintiff in opposition submits a name redacted affidavit from a physician licensed to practice medicine in Illinois who is board certified in anesthesiology, who states that he or she is fully familiar with the standards of care in the area of anesthesiology in the State of New York in 2013; and that in his or her my professional experience and training as a physician practicing anesthesiology, he or she routinely administer anesthesia to patients undergoing surgery; and has similarly participated in intubations, extubation and tracheostomy surgical procedures. Plaintiff also submits an name redacted affirmation from a physician licensed to practice medicine in New York who is board certified in internal medicine and pulmonary medicine.

Plaintiff's anesthesiology expert opines that that defendants deviated from good and accepted standards of care by failing to perform a tracheostomy procedure in a timely accepted ten-day window to replace the endotracheal intubation tube in her throat to assist with mechanical ventilation and that defendants' failure to do so, was a proximate cause of the bilateral vocal cord paralysis Ms. Yashar sustained. Said expert opines that NSUH deviated from generally accepted standards of care in by failing to implement an early tracheostomy care plan for Ms. Yashar who was critically ill upon admittance to NSUH. Said expert further opines that plaintiff was clearly a candidate for early tracheostomy, and it was a departure for NSUH not to do so. Plaintiff's expert opines that injury to the trachea and vocal cords, such as vocal cord paralysis, can occur at any time, and certainly within the window of eleven to fourteen days of endotracheal intubation. This expert also opines that Dr. Bagdonas, Dr. Underwood, Dr. Bholat, and the entire Emergency Department staff, as well as the critical care unit staff departed from accepted standards of care by failing to timely determine the need for an early tracheostomy care plan in light of Ms. Yashar's critical condition upon admittance to NSUH, and at all times after by failing to order a tracheostomy in a timely manner as detailed above. Said expert further opines that these departures were a proximate cause to the vocal cord paralysis injuries Ms. Yashar sustained.

Plaintiff internal medicine and pulmonary medicine expert opines to a reasonable degree of medical certainty that defendants deviated from good and accepted standards of care by failing to perform a tracheostomy procedure to replace the endotracheal intubation tube in her throat to assist with mechanical ventilation; and that defendants' failure to do so, was a proximate cause of the bilateral vocal cord paralysis Ms. Yashar sustained in this case. Said expert opines that NSUH deviated from generally accepted standards of care in this case

by failing to implement an early tracheostomy care plan for Ms. Yashar who was critically ill upon admittance to NSUH. Said expert opines that Ms. Yashar was clearly a candidate for early tracheostomy, and it was a departure for NSUH not to do so. This expert also opines within a reasonable degree of medical certainty that Dr. Bagdonas, Dr. Underwood, Dr. Bholat, and the entire Emergency Department staff, as well as the critical care unit staff departed from accepted standards of care by failing to timely determine the need for an early tracheostomy care plan in light of Ms. Yashar's critical condition upon admittance to NSUH, and at all times after by failing to order a tracheostomy in a timely manner. Said expert opines that these departures were a proximate cause to the vocal cord paralysis injuries Ms. Yashar sustained. Said expert further opines to a reasonable degree of medical certainty that each departure set forth in said affirmation was individually a substantial contributing cause of the vocal cord injury.

In reply, defendant has submitted a supplemental affirmation from Dr. Poor which addresses the claims raised by plaintiff's experts regarding allegations of improper treatment of "flail chest syndrome".

Although plaintiff alleges in her bill of particulars that defendant NSUH failed to properly and timely perform a tracheotomy and failed to properly and timely formulate an appropriate treatment plan, she does not allege that she had flail chest syndrome or any symptoms of said syndrome for which a tracheotomy should have been performed within a specific time period. Therefore, to the extent that plaintiff's experts' opinions pertaining to an alleged failure to implement a plan and to timely perform a tracheostomy are based upon a claim of flail chest syndrome, this claim is rejected as it is well settled that "[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars" (*Anonymous v Gleason*, 175 AD3d 614, 616-17 [2d Dept 2019], quoting *Palka v Village of Ossining*, 120 AD3d 641, 643, [2d Dept 2004]; see *Samer v Desai*, 179 AD3d 860, 861-64 [2d Dept 2020]; *Hanson v Sewanhaka Cent. High Sch. Dist.*, 155 AD3d 702, 703 [2d Dept 2017]; *Shaw v City of New York*, 139 A.D.3d 698, 699-700 [2d Dept 2016]; *Garcia v Richer*, 132 AD3d 809, 810 [2d Dept 2015]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

However, to the extent that plaintiff's experts opinions are otherwise based upon the evidence in the medical record, this Court finds that a triable issue of fact exists as to whether defendant NSUH departed from good and accepted medical practice by failing to properly and timely formulate an appropriate treatment plan, and/ or by failing to properly and timely perform a tracheotomy and whether said failures were a proximate cause of her injuries, which may require a resolution at trial.



Partial summary judgment is granted dismissing plaintiff’s claim of lack of informed consent as said claim is addressed and refuted by defendant’s expert and is not addressed by plaintiff’s experts.

Partial summary judgment is granted dismissing plaintiff’s claims for negligently intubating or failing to properly intubate plaintiff; for failing to properly and timely extubate; for negligently allowing, causing or permitting reintubation; for failing to timely communicate with other healthcare providers rendering services to plaintiff; for failing obtain necessary consultations in a timely fashion; for failing to o comply with and abide by hospital rules, regulations, policies and procedures; for failing to to promulgate and/or enforce reasonable rules, regulations, policies and procedures ; for failing to devote sufficient time, attention and skill to the care and treatment of plaintiff; and for failing to supervise the medical services rendered to plaintiff, as these claims were addressed and refuted by defendant’s experts and are not addressed by plaintiff’s experts.

Partial summary judgment is granted dismissing plaintiff’s claim of negligent hiring and supervision. “Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee’s negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training” (*Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]; see *Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 741-42 [2d Dept 2017]; *Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; see also *Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213, 213 ([1st Dept 1998])). Here, it is undisputed that Drs. Underwood, Bholat, Bagdonas, Bank and Kadakde, NSUH’s Emergency Department staff, and it Critical Care Unit staff were all acting within the scope of their employment. Although an exception exists to this general principle where the plaintiff seeks punitive damages from the employer “based on alleged gross negligence in the hiring or retention of the employee” (*Talavera v Arbit*, 18 AD3d at 738), that exception is inapplicable here, as plaintiff does not seek to recover punitive damages. Finally, this Court notes that while an employer may be liable for a claim of negligent hiring, training or supervision if an employee commits an “independent act of negligence outside the scope of employment” and the employer “was aware of, or reasonably should have foreseen, the employee’s propensity to commit such an act” (*Seiden v Sonstein*, 127 AD3d 1158, 1160-1161 [2d Dept 2015]), plaintiff has failed to allege such a claim (see *Lamb v Baker*, 152 AD3d 1230, 1231 [4th Dept 2017]).

Dated: May 26, 2022

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J.S.C.

