SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH N. MCMAHON** **PART** **30M**

Justice

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LUBOS SEC, EVA SEC,

Plaintiff,

- v -

JOSEPH YOE, ROBERT ADAIR, WEST SIDE MEDICAL SERVICES, P.C.,ROBERT A. ADAIR M.D., P.A., MOUNT SINAI HEALTH SYSTEM, INC.,MOUNT SINAI ST. LUKE'S HOSPITAL

Defendant.

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INDEX NO. 805222/2018

MOTION DATE 05/03/2023, 05/03/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 119, 121, 122, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 155, 156

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that the motions for summary judgment of the defendants Joseph Yoe, M.D. s/h/a "Joseph Yoe" and West Side Medical Services, P.C. (Mot. Seq. No. 003) and of Robert A. Adair, M.D. s/h/a Robert Adair and Robert A. Adair, M.D., P.A., (Mot. Seq. No. 004)[1] are granted to the extent that plaintiffs' second cause of action for lack of informed consent is severed and dismissed. The balance of the motions is denied. The defendant, West Side Medical Services, P.C., may be held vicariously liable for the alleged negligence or malpractice of Dr. Yoe.

[1] It is noted that the defendants Mount Sinai Health System, Inc., and Mount Sinai St. Luke's Hospital did not move for summary judgment or take any position with respect the motions.

This matter arises out of alleged medical malpractice rendered to the forty-five-year-old Lubos Sec, who claims, *inter alia*, that in June and July of 2016 the defendants failed to timely and properly diagnose and treat him for an infection, osteomyelitis, and abscess in his spine, which required him to undergo extensive treatment and a prolonged period of recovery. The complaint alleges causes of action for medical malpractice, lack of informed consent, and a derivative cause of action on behalf of Eva Sec.

At issue are three office visits with defendant Joseph Yoe, M.D., on June 13, 2016, June 23, 2016, and July 1, 2016, and two office visits with defendant Robert A. Adair, M.D., on June 20, 2016, and June 28, 2016.

Plaintiff had treated with Dr. Adair in 2008 and 2011 for unrelated conditions, and then presented to him again on May 31, 2016[2] for what plaintiff claims were complaints of back pain (*see, e.g.,* NYSCEF Doc No. 130, p. 28; Dr. Adair's **records do not reflect plaintiff's complaint of back pain**). At the May 31, 2016 office visit, plaintiff had a low-grade fever (99.5), his blood pressure was 130/80, and he weighed 146 lbs., having lost six pounds since his last visit five years earlier. Plaintiff was also tachycardic with an elevated heartrate of 107. Dr. Adair ordered labs and blood work, which revealed increased white blood cells, increased monocytes, and anemia. Dr. Adair referred plaintiff to a hematologist (the defendant, Dr. Yoe) for a hematologic workup.

Plaintiff saw Dr. Yoe on June 13, 2016, at his West Side Medical Services, P.C. practice. Dr. Yoe noted plaintiff's abnormal lab values (*i.e.,* low hematocrit, elevated granulocytes,

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[2] Neither the Summons and Complaint nor the Verified Bill of Particulars reference a May 31, 2016, date, and accordingly **all claims made by plaintiff for Dr. Adair's failure to properly workup or properly diagnose and treat him on May 31, 2016 are severed and dismissed** (*see Paterra v. Arc Development LLC,* 136 AD3d 474 [1st Dept. 2016]).

thrombocytes, leukocytes, platelet count, white blood cell count), and that plaintiff was tachycardic at this visit (pulse rate of 104). Dr. Yoe's assessment was mild anemia with borderline iron deficiency. Plaintiff claims that he complained to Dr. Yoe about upper back pain (*see* NYSCEF Doc. No. 130, p. 31), but Dr. Yoe denies this (*see* NYSCEF Doc. No. 111 pp 22, 35, 55-56) and his **office records, with the exception of a note on an order for a chest x-ray, are silent as to back pain**. Dr. Yoe ordered additional blood tests, urinalysis, an ultrasound of the abdomen[3] and a chest x-ray[4]. He suspected an underlying chronic infection or inflammation and recommended a GI work up as well. Plaintiff was to return to Dr. Yoe in three weeks.

Plaintiff returned to Dr. Adair on June 20, 2016 and reported that he was doing "over-head" construction work and was suffering from back pain for the past four days. Dr. Adair's diagnosis was thoracolumbar sprain/strain. He referred plaintiff for physical therapy and scheduled a follow-up in one week. Dr. Adair did not recommend radiography since there was no evidence of trauma, and the back pain did not appear to be acute.

Dr. Yoe called plaintiff on June 21, 2016, and June 22, 2016 to schedule an immediate office visit, as the chest x-ray findings were concerning for a relatively young patient who smoked five cigarettes per day. Plaintiff saw Dr. Yoe on June 23, 2016, at which time the doctor recommended a CT scan of the chest and abdomen with oral contrast to evaluate a lung lesion and echogenic gallbladder. He also ordered a TB test. Repeat labs showed a slightly elevated white blood cell count, and plaintiff was positive for Helicobacter pylori, a type of bacteria that causes inflammation and ulcers in the stomach or small intestine. Plaintiff's heartrate was again

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[3] A June 21, 2016, abdominal ultrasound revealed a small echogenic focus adjacent to the lateral gallbladder wall which could be the basis for a small hemangioma.

[4] Plaintiff had reported that he smoked five cigarettes a day for many years. The chest x-ray revealed an abnormal appearance of the right upper lung which the interpreting radiologist noted could be due to an underlying neoplastic process or chronic infection such as TB. right upper lobe volume loss and opacification with associated hilar retraction. A post-contrast CT scan of the chest was recommended.

elevated at 101, but his other vital signs were normal. Plaintiff was instructed to return to Dr. Yoe after the chest CT scan.

On June 28, 2016 plaintiff returned to Dr. Adair, who again noted decreased iron and increased platelets, along with a recent "back excoriation." Plaintiff reported that his intrascapular sprain/strain and muscle spasm had improved with physical therapy. Dr. Adair prescribed Meloxicam and Ultracet for pain and suspected a hematologic disorder or an infection but did not order any radiology at this appointment because plaintiff's condition was improving. He also directed plaintiff to return in three weeks.

On July 1, 2016, plaintiff underwent the chest/pelvic/abdomen CT scan which revealed a large right upper lung lobe mass measuring 7.3 x 5.0 cm and a narrowing of the upper lobe bronchus. There was also multiple sub centimeter solid, ground glass and spiculated nodules throughout the lung consistent with metastasis, and a left adrenal gland nodule measuring 10 x 13 mm, with multiple scattered sclerotic lesions seen throughout the thoracic spine, lumbar spine, right iliac bone, left hernisacrum, right ischium, and bilateral femoral heads. The radiologist's findings (*i.e.*, "compatible with right upper lobe carcinoma with bilateral pulmonary metastasis") were given to Dr. Yoe via telephone at 12:05 p.m. Plaintiff returned to Dr. Yoe that afternoon and was immediately referred to interventional radiology for a biopsy of the right upper lung mass. Dr. Yoe also contacted interventional radiology on July 8, 2016 and July 11, 2016 to ensure that the imaging he sent to IR had been reviewed. Plaintiff awaited approval from his insurance company for the biopsy, which was ultimately scheduled for July 18, 2016.

On July 10, 2016, plaintiff presented to Mount Sinai St. Luke's Hospital Emergency department with complaints of lower back pain radiating to both legs with difficulty ambulating for five days. Plaintiff also reported problems with bladder and bowel control (*see* NYSCEF

Doc. No. 130, p 121). He was discharged home with a diagnosis of sciatica and instructed to take Percocet and Meloxicam for pain and to follow up with his primary care physician.

Following the discharge on July 10, 2016, plaintiff's condition progressively worsened, to the point that he was unable to walk without assistance.

On July 13, 2016 plaintiff finally received notification that the biopsy was approved and scheduled for July 18, 2016. However, while speaking with Dr. Yoe's office regarding that date, plaintiff informed that he had severe weakness and pain in both legs and could not walk. Dr. Yoe told plaintiff to go directly to the emergency department at Roosevelt Hospital.

On July 14, 2016 plaintiff was taken by ambulance to Mount Sinai West, with complaints of back pain and increasing leg weakness. An MRI of the cervical spine showed an epidural tumor extending from mid-T1 through mid T6 with severe narrowing of the cord with edema.

Emergent spinal surgery was performed on July 15, 2016, which included a C5-C6 fusion for cord compression, T3 corpectomy with cement augmentation, T1-T5 decompressive laminectomy, C5-T8 posterior fusion and instrumentation by the neurosurgeon, Dr. Evan Baird, who confirmed the presence of a spinal cord abscess intraoperatively.

Prior to his discharge, imaging revealed a C5-C6 lateral mass screw pull out. Nevertheless, on July 27, 2016 plaintiff was transferred to Mount Sinai Inpatient Acute Rehabilitation for continued care. He was unable to ambulate on his own and required in-home rehabilitation therapies thereafter.

Plaintiff was confined to a wheelchair for one year, and gradually transitioned to a walker. He received a six-week course of the IV antibiotic, Ceftriaxone, and currently walks without assistance. On September 7, 2016 Mr. Sec underwent revision surgery for the instrumentation at C2-T6.

In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch,* 91 AD3d 147 [1st Dept. 2012]).

In support of Motion Seq. No. 003, Joseph Yoe, M.D. and West Side Medical Services, P.C. attach the expert affirmation of David Diuguid, M.D., an internist with sub-certifications in Medical Oncology/Hematology (*see* NYSCEF Doc. No. 88). Dr. Diugid opines within a reasonable degree of medical certainty that Dr. Yoe "provided appropriate care throughout the treatment period at issue, including but not limited to **June 13, 2016, June 23, 2016** and **July 1, 2016** during which time [plaintiff] was appropriately assessed for mild anemia, lung lesion and gallbladder lesion" (*id.,* para. 5), and that "[plaintiff's] injuries were not the direct result of any alleged delay on the part of [Dr. Yoe]" (*id.,* para 8).

Specifically, Dr. Diuguid finds that Dr. Yoe's suspicion of an underlying chronic infection or inflammation was reasonable based on plaintiff's elevated monocyte level, and that the doctor acted appropriately in (1) ordering comprehensive blood work, urinalysis, and an ultrasound of the abdomen and chest x-ray; (2) instructing plaintiff to return in three weeks to review the test results; (3) recommending a CT scan of the chest abdomen and pelvis; (4) first investigating the lung lesion and immediately referring plaintiff to an interventional radiologist for a biopsy; (5) immediately referring plaintiff to the Roosevelt emergency department on July

13, 2016, when he learned that plaintiff refused the July 18th biopsy due to an inability to walk, and (6) consulting on plaintiff's care during his hospital admission on four different occasions (July 15th, July 18th, July 23rd and July 24th). Dr. Diuguid concludes that plaintiff "did not have any signs, symptoms or complaints consistent with an acute infection as demonstrated by the labs, radiology studies and physical examinations" (*id.*, para 32) and that "there is nothing else Dr. Yoe could have or should have done during his brief course of treatment with Mr. Sec and...at all times acted expeditiously, appropriately and consistent with the standard of care" (*id.*, para 31).

In support of Motion Seq. No. 004, Robert A. Adair, M.D. attaches, *inter alia*, the affirmation of internist Michael Hundert, M.D. (*see* NYSCEF Doc. No. 104) who opines within a reasonable degree of medical certainty that Dr. Adair's care and treatment "was at all times within the standard of care and that his treatment, given the scope of his practice, as at all times appropriate" (*id.*, para 12).

Dr. Hundert explains that a slightly elevated white blood count and low-grade fever alone, are not indicative of a potential infection and/or the need for a further workup. In the absence of localizing clinical signs to assume or suspect an underlying infection, the expert opines that Dr. Adair (1) appropriately referred plaintiff to a hematologist related to his low iron levels; (2) did not fail to observe and/or diagnose any infection or spinal abscess, given the absence of clinical signs of infection (*i.e.*, normal vital signs, no fever, chills, weakness, lethargy, fatigue, nausea and/or vomiting) and plaintiff's complaint of back pain related to his construction work; (3) appropriately referred plaintiff for physical therapy on June 20th due to plaintiff's muscle spasms and thoracolumbar sprain; (4) did not fail to appreciate an infection or fail to order further blood or diagnostic tests to investigate a potential infection on June 28, 2016, since

there was no clinical basis for same and the excoriation on the plaintiff's back, without inflammation or swelling, was not an indicative of an infection, and (5) did not abandon or fail to follow up with plaintiff after his last office visit on June 28, 2016, given Mr. Sec's irregular prior treatment history and given that plaintiff was following with Dr. Yoe.

Dr. Hundert concludes that "plaintiff did not exhibit any clinical signs, complaints and/or symptoms indicative of an infection during Dr. Adair's care and treatment, such that Dr. Adair can be found to have missed an infection and/or failed to treat any such infection" (*id.*, para 33).

"The affirmation of defendant's expert was sufficient to meet defendant's *prima facie* burden of establishing the absence of a departure "from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018] [*internal citations and quotations omitted*]. "An expert's opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert's opinion is without probative force" (*Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [*internal citations omitted*]).

"Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567 at 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion by Dr. Yoe and West Side Medical Services, P.C., plaintiffs submit, critically, the redacted affirmation of a medical oncologist (*see* NYSCEF Doc. No. 140) who opines unequivocally that the "departures made by Dr. Yoe were competent producing causes, separately and cumulatively, of a consequential delay in the diagnosis of Mr. Sec's spinal abscess" (*id.*, para 6) "infection, partial paralysis, the need for multiple spinal surgeries, extensive and prolonged rehabilitation, extensive antibiotic therapy, and all the complications and sequelae resulting therefrom" (*id.*, para 33).

According to plaintiff's expert, Dr. Yoe departed from the standard of care when he (1) failed to order imaging of plaintiff's back and refer plaintiff for an orthopedic or neurological consult in response to Mr. Sec's complaints of persistent back pain (*see* plaintiff's deposition testimony at NYSCEF Doc. No, 130, p. 31; *see also* Brick-Run records confirming subjective persistence of back pain since May 1, 2016), and (2) failed to draw the appropriate connections, in terms of a differential diagnosis, between Mr. Sec's persistent back pain and the possibility of underlying infection. The expert disagrees with Dr. Diuguid's findings that plaintiff did not present with focal complaints of persistent back pain, relying in part on plaintiff's own deposition testimony, Dr. Yoe's "admittedly hard to follow" deposition testimony on the issue of whether plaintiff complained of back pain (*id.*, para. 31), and Dr. Yoe's order for the chest x-ray, which includes the notation that it had been ordered because of back pain. According to the expert, the standard of care "would oblige Dr. Yoe to investigate any complaints of pain, especially those involving the spine, and....take affirmative and directly responsive steps such as ordering an appropriate work-up or making an appropriate referral" (*id.*, para. 32).

In opposition to Dr. Adair's motion, plaintiffs submit the redacted affidavits of two internists/critical care experts (*see* NYSCEF Doc. Nos. 125, 126) the first of whom opines within

a reasonable degree of medical certainty that Dr. Adair departed from accepted standards of care by failing to perform a proper work-up for plaintiff's complaints of "acute onset of back pain, unintentional weight loss, and abnormal laboratory values suggestive of an infectious process" (*see* NYSCEF Doc. No. 125, para. 38). According to the expert, Dr. Adair departed from the standard of care on June 20, 2016 and June 28, 2016 when he failed to order imaging studies to determine the etiology of Mr. Sec's back pain in the setting of unintentional weight loss and abnormalities in lab findings, including elevated phosphate levels. Plaintiffs' expert is emphatic that Dr. Adair's failure to order a CT or MRI imaging on June 20, 2016 and June 28, 2016 was a departure from the standard of care, and that "had diagnostic imaging of the back been ordered by Dr. Adair at any of these...visits...it more likely than not would have discovered abnormalities within Mr. Sec's spine that would have ultimately led to an earlier diagnosis and treatment of his spinal infection" (*id.*, para 46).

The foregoing expert affirmations raise clear questions of fact sufficient to defeat summary judgment. "The medical experts' conflicting opinions...raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). In this case, the trier of fact must assess the parties' relative credibility, including whether Mr. Sec complained of back pain during his two visits with Dr. Adair and three visits with Dr. Yoe, and whether the doctors' alleged departures from the standard of care were a proximate cause of plaintiff's injuries.

The Court notes, however, that "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'" (Public Health Law 2805-d(2)[b]; *Janeczko v. Russel*, 46 AD3d 324 [1st Dept. 2007] [*internal citations omitted*]), which is not the case here.

Accordingly, the Court has no alternative but to dismiss plaintiff's second cause of action for lack of informed consent.

As previously indicted, all claims related to plaintiff's May 31, 2016, office visit with Dr. Adair are severed and dismissed, since this date was not contained in plaintiffs' Complaint or Verified Bills of Particulars (*see, e.g., Golubov v. Wolfson,* 22 AD3d 635 [2d Dept. 2005]).

Accordingly, it is

ORDERED that the motions for summary judgment by the defendants Joseph Yoe, M.D. s/h/a Joseph Yoe and West Side Medical Services, P.C. is granted to the extent that plaintiffs' cause of action for lack of informed consent is dismissed, and West Side Medical Services, P.C. may be held vicariously liable for the negligence or malpractice of Dr. Yoe; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the motion for summary judgment by the defendant Robert A. Adair, M.D., is granted to the extent that plaintiffs' cause of action for lack of informed consent is dismissed, and the balance of the motion is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing plaintiffs' "Second Cause of Action"; and it is further

ORDERED that all additional requests for relief are hereby denied; and it is further

ORDERED that the parties appear for a virtual pre-trial conference via Microsoft Teams on **June 15, 2023, at 10:30 a.m.**

5/15/2023
DATE

JUDITH N. MCMAHON, J.S.C.

Hon. Judith N. McMahon
J.S.C.

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

805222/2018 SEC, LUBOS vs. YOE, JOSEPH
Motion No. 003 004