

**Castro v Trust**

2023 NY Slip Op 33612(U)

August 31, 2023

Supreme Court, Queens County

Docket Number: Index No. 712813 2019

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE  
Justice

IA Part MDP

CARLA NUNEZ CASTRO Individually, and as  
Administrator of the Estate of DERON ROBERT  
CASTRO, Deceased,

Index Number 712813 2019

Plaintiff,

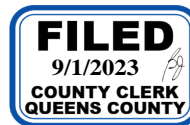
- against -

Motion Date March 29, 2023

ARTHUR TRUST, D.O., NASSAU QUEENS  
PULMONARY ASSOCIATES, P.C., ELIAS P.  
BONAROS, JR., M.D., CARDIOVASCULAR  
CONSULTANTS OF LONG ISLAND, P.C.,  
THEOFANIS TSAMTSIOURIS, M.D.,  
DANYALL MOIN, M.D., ST. FRANCIS  
HOSPITAL and CATHOLIC HEALTH SYSTEM  
OF LONG ISLAND, INC.,

Motion Seq. Nos. 1, 2

Defendants.



x

The following electronically filed papers read on the separate motions by defendants Arthur Trust, D.O. and North Shore-Long Island Jewish Internal Medicine at New Hyde Park, P.C. d/b/a North Shore-Long Island Jewish Medical Group at Nassau Queens Pulmonary Associates, P.C. s/h/a Nassau Queens Pulmonary Associates, P.C. (Seq. No. 1) and defendant Theofanis Tsiamtsiouris, M.D. (Seq. No. 2) for an order granting summary judgment pursuant to CPLR 3212 and entering judgment in their favor.

Papers  
Numbered

Notice of Motion (Seq. No. 1) – Affirmations – Exhibits .....	EF 82 – 102, 104
Notice of Motion (Seq. No. 2) – Affirmations – Exhibits .....	EF 107 – 122, 125 – 130
Answering Affirmations – Exhibits .....	EF 133 – 142
Reply Affirmations – Exhibits .....	EF 143 – 146

Upon the foregoing papers, it is ordered that the motions are consolidated for disposition and are determined as follows:

In this medical malpractice action, plaintiff alleges that defendants Arthur Trust, D.O., Nassau Queens Pulmonary Associates, P.C., Elias P. Bonaros, Jr., M.D., Cardiovascular

Consultants of Long Island, P.C., Theofanis Tsiamtsiouris, M.D., Danyall Moin, M.D., St. Francis Hospital and Catholic Health Systems of Long Island, Inc. were negligent in failing to timely and properly diagnose and treat Deron Robert Castro (the decedent), which resulted in his death on July 27, 2018.

Carla Nunez Castro, the decedent's wife, individually and as administrator of the estate of the decedent, commenced this action on July 24, 2019 by the filing of a summons and verified complaint. The verified complaint contains causes of action for medical malpractice, lack of informed consent, wrongful death, loss of services and negligent hiring and retention.

Defendants Arthur Trust, D.O. and North Shore-Long Island Jewish Internal Medicine at New Hyde Park, P.C. d/b/a North Shore-Long Island Jewish Medical Group at Nassau Queens Pulmonary Associates, P.C. s/h/a Nassau Queens Pulmonary Associates, P.C. (hereinafter together Dr. Trust defendants) and Theofanis Tsiamtsiouris, M.D., now move, in two separate motions, for summary judgment, dismissing all claims against them, on the ground that they did not deviate from good and accepted medical practice, and even if there was a departure, the departure was not causally related to the decedent's injury. Dr. Trust defendants and Dr. Tsiamtsiouris also move to dismiss the lack of informed consent claim. Nassau Queens Pulmonary Associates, P.C. further moves on the grounds that all vicarious liability claims and claims regarding negligent hiring, supervision and training should be dismissed.

A summary judgment proponent must make a prima facie showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) The burden then "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." (*Gaston v New York City Health & Hosps. Corp.*, 207 AD3d 705, 706 [2d Dept 2022], quoting *Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863 [2d Dept 2021].)

#### Medical Malpractice

"A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853) with respect to at least one of the elements of a cause of action alleging medical malpractice (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries." (*Williams v Halstead*, 202 AD3d 891, 892 [2d Dept 2022], quoting *Russell v Garafalo*, 189 AD3d 1100, 1101 [2d Dept 2020].)

"[T]he defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars." (*Vargas v Lee*, 207 AD3d 684, 685 [2d Dept 2022], quoting *Wiater v Lewis*, 197 AD3d 782, 783 [2d Dept 2021].) A physician may establish that he or she did not depart or deviate from accepted medical practice in his or her treatment of the patient, and that he or she was not the proximate cause of the plaintiff's injuries through the

submission of medical records and competent expert affidavits. (*See Alao v Richmond Univ. Med. Ctr.*, 213 AD3d 722, 724 [2d Dept 2023]; *M. T. v Lim*, 213 AD3d 722 [2d Dept 2022]; *Joyner v Middletown Med., P.C.*, 183 AD3d 593 [2d Dept 2020].)

The burden then “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.” (*Zomber v Forde*, 209 AD3d 935, 936 [2d Dept 2022].) General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment. (*See Palagye v Loulmet*, 203 AD3d 729 [2d Dept 2022].) “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.” (*Wijesinghe v Buena Vida Corp.*, 210 AD3d 824, 825 [2d Dept 2022], quoting *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017].)

Dr. Trust defendants submitted, inter alia, the affirmation of Elias Sakalis, M.D., a physician licensed to practice in the State of New York and is board certified in internal medicine. Dr. Sakalis reviewed the pertinent medical and nursing home records, pleadings and plaintiff's deposition testimony, and opined, to a reasonable degree of medical certainty, that the care rendered by Dr. Trust on February 2, 2018 and June 1, 2018 did not depart from the applicable standards of medical care of good and accepted care. He further opined that any alleged departures were not a proximate cause of the decedent's injuries and death.

Dr. Tsiamtsiouris submitted, inter alia, the affidavit of Edward Julie, M.D., a physician licensed to practice in the State of New Jersey and is board certified in internal medicine and certified in the subspecialty of cardiovascular disease. Dr. Julie reviewed the pertinent medical and nursing home records, pleadings and plaintiff's deposition testimony, and opined, to a reasonable degree of medical certainty, that the care and treatment rendered to the decedent was at all times in accordance with good and accepted standards of medical care. He further opined that any alleged departures were not a substantial factor in bringing about the decedent's injuries and death.

In opposition to Dr. Trust defendants and Dr. Tsiamtsiouris' prima facie showing, plaintiff submitted the affirmation of a board-certified cardiologist with specialization in interventional cardiology and licensed to practice in the State of New York to raise issues of fact as to whether the moving defendants departed from good and accepted medical practices in the treatment of the decedent, and whether such departures were a proximate cause of the decedent's injuries. The parties' experts clearly disagree on numerous issues, including but not limited to whether: Dr. Trust was required to formulate a differential diagnosis and rule out cardiac-related etiology given the decedent's medical history, whether Dr. Trust's alleged departures delayed proper workup and treatment of the decedent, whether Dr. Tsiamtsiouris was qualified to perform the percutaneous coronary intervention (PCI) and whether the standard of care required Dr. Tsiamtsiouris to consult other physicians prior to performing the PCI, whether Dr. Tsiamtsiouris departed from accepted standards of care when he proceeded with the PCI following the

decedent's angiogram and whether Dr. Tsiamsiouris should have aborted the PCI procedure sooner.

“Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts, which present a credibility question requiring a jury’s resolution.” (*Berger v Hale*, 81 AD3d 766, 766 [2d Dept 2011]; *see Salgado v North Shore Univ. Hosp.*, 167 AD3d 1057 [2d Dept 2018]; *Reustle v Petraco*, 155 AD3d 658 [2d Dept 2017].) The existence of material factual issues obviates the granting of summary judgment to defendants. (*See Stucchio ex rel. Hernandez v Bikvan*, 155 AD3d 666, 667 [2d Dept 2017]; *Lesniak v Stockholm Obstetrics & Gynecological Services, P.C.*, 132 AD3d 959 [2d Dept 2015].)

#### Lack of Informed Consent

“To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove: “(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.” (*Alessi v Mucciolo*, 156 AD3d 750 [2d Dept 2017] [internal quotation marks and citation omitted]; Public Health Law § 2805-d [1], [3].) The right to recover for medical malpractice based upon lack of consent is “limited to cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnosis procedure which involved invasion or disruption of the integrity of the body.” (Public Health Law § 2805-d [2].) “The fact that a plaintiff signed a consent form, alone does not establish a defendant's prima facie entitlement to judgment as a matter of law.” (*Palmeiro v Luchs*, 202 AD3d 989, 991-92 [2d Dept 2022].)

Dr. Trust defendants made a prima facie showing that the treatment rendered by Dr. Trust did not require informed consent. (*See Samer v Desai*, 179 AD3d 860, 864 [2d Dept 2020].) In opposition, plaintiff failed to raise a triable issue of fact as she did not address this issue. (*See Williams v Light*, 196 AD3d 668, 670 [2d Dept 2021]; *Pirri-Logan v Pearl*, 192 AD3d 1149 [2d Dept 2021].) Thus, this branch of Dr. Trust defendants’ motion is granted, without opposition. (*See Mitchell v Lograno*, 108 AD3d 689 [2d Dept 2013].)

With respect to Dr. Tsiamsiouris, although he testified at his deposition that the decedent was informed of the cardiac catheterization procedure, alternative treatments, benefits and risks, plaintiff’s deposition testimony indicated the contrary, that no one explained the stenting procedure to the decedent in plaintiff’s presence. Since Dr. Tsiamsiouris’ submission included plaintiff’s deposition transcript, he failed to establish, prima facie, that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent. (*See Palmeiro v Luchs*, 202 AD3d at 991-92.) Thus, this branch of Dr. Tsiamsiouris’ motion is denied.

Negligent Hiring, Supervision and Training

The branch of Dr. Trust defendants' motion to dismiss plaintiff's claim against Nassau Queens Pulmonary Associates, P.C. alleging negligent hiring, supervision and training is granted without opposition.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, the motion by defendant Theofanis Tsiamsiouris, M.D. for summary judgment is denied. The branch of the motion by Dr. Trust defendants seeking summary judgment dismissing plaintiff's claims alleging lack of informed consent and negligent hiring, supervision and training are granted without opposition. The remaining branch of their motion is denied.

Dated: August 31, 2023

  
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PETER J. O'DONOGHUE, J.S.C.

