Foster v Kassab
2020 NY Slip Op 35655(U)
April 28, 2020
Supreme Court, Bronx County
Docket Number: Index No. 28645/2018E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A

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DOROTHY FOSTER, as Administratrix of the estate of KY MARCEL SWAILS, deceased,

Index №. 28645/2018E

-against-

Hon. GEORGE J. SILVER

MARIA KASSAB, M.D., JEAN BALZORA M.D., ALINA PURCEA, M.D., LINCOLN HOSPITAL MEDICAL AND MENTAL HEALTH CENTER AND NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Justice Supreme Court

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The following papers numbered 1 to 3 were read on this motion for (**Seq. No. 003**) for **SUMMARY JUDGMENT**:

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is

motion is decided in accordance with the annexed decision and order of the court.

Dated: April 28, 2020

Hon. [signature]
GEORGE J. SILVER, J.S.C.

1. CHECK ONE.. ☒ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.. ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.......................... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

INDEX NO. 28645/2018E
RECEIVED NYSCEF: 05/04/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A
--X
DOROTHY FOSTER, as Administratrix of the estate of KY MARCEL SWAILS, deceased,

Plaintiff,

Index No. 28645/2018E
Motion Seq. 003

-v-

DECISION & ORDER

MARIA KASSAB, M.D., JEAN BALZORA M.D., ALINA PURCEA, M.D., LINCOLN HOSPITAL MEDICAL AND MENTAL HEALTH CENTER AND NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.
--X
GEORGE J. SILVER, J.S.C.:

Defendants MARIA KASSAB, M.D. ("Dr. Kassab"), JEAN BALZORA M.D. ("Dr. Balzora"), ALINA PURCEA, M.D. ("Dr Purcea"),[1] LINCOLN HOSPITAL MEDICAL AND MENTAL HEALTH CENTER ("Lincoln"), and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC" collectively "defendants") move for summary judgment. Plaintiff DOROTHY FOSTER ("plaintiff"), as administratrix of the estate of KY MARCEL SWAILS ("decedent"), deceased, opposes the motion. For the reasons discussed below, the court grants defendants' motion.

On October 5, 2016, decedent presented to Lincoln's emergency department ("ED") with complaints of abdominal pain for the past five months. Decedent reported three episodes of bloody urine and dysuria[2] that were resolving. An examination of decedent's abdomen revealed tenderness of the epigastrium, and decedent was given Famotidine and Esomeprazole in the ED

[1] As plaintiff does not oppose the motion with respect to Dr. Purcea, summary judgment is granted in Dr. Purcea's favor.
[2] Dysuria refers to painful or difficult urination.

with improvement. Decedent's abdominal pain was believed to be likely due to "gastritis,"[3] and decedent was discharged with a prescription for Maalox-Plus and Colace.

On October 27, 2016, decedent submitted a stool sample, which tested positive for Helicobacter pylori ("H. Pylori") bacteria.[4]

On November 7, 2016, decedent presented to Dr. Purcea with complaints of burning pain in his stomach for the past six-to-seven years, which was exacerbated by acidic foods. Decedent denied bloody or dark stools, unintentional weight loss, nausea, and vomiting. Decedent's vital signs were normal, and decedent's physical examination was unremarkable. Dr. Purcea noted that decedent was prescribed with Ranitidine for his symptoms, and Docusate for constipation in October of 2016. A laboratory study of decedent's stool was positive for H. Pylori, and decedent was given a prescription for Amoxicillin, Clarithromycin, Omeprazole, and Psylium. Decedent was diagnosed with upper abdominal pain, unspecified, and was advised to follow up at the medicine clinic in three months.

On December 23, 2016, decedent's stool sample was negative for H. Pylori bacteria.

During a follow-up visit at Lincoln's medicine clinic on January 12, 2017, decedent saw Dr. John Flynt ("Dr. Flynt"), a resident, and Dr. Balzora, the attending physician. Decedent reported that the burning in his epigastric region had improved since his treatment in November. Decedent denied bloody and black stool, but complained of constipation. Decedent's vital signs were normal, and his physical examination was unremarkable. Dr. Flynt's plan was to refer decedent for a gastroenterology ("GI") consult for a possible esophagogastroduodenoscopy

[3] Gastritis is an inflammation, irritation, or erosion of the lining of the stomach.
[4] H. pylori infection occurs when H. pylori bacteria infects the stomach. It can cause sores (ulcers) in the lining of the stomach or the upper part of the small intestine.

("EGD"),[5] and to consider a fecal immunochemical test ("FIT")[6] to screen for colon cancer. Decedent was advised to follow up at the clinic in three months.

On February 23, 2017, decedent presented to Dr. Kassab for a GI consultation at Lincoln. Decedent reported that his complaints of epigastric pain had resolved after he was treated for H. Pylori in December of 2016, and that he experienced chronic constipation for many years with hard bowel movements every three days, for which he took Metamucil. Decedent denied unintentional weight loss, and bloody and black stool. Dr. Kassab's plan was to perform a colon cancer screening due to decedent's complaints of constipation, age (45-years-old), and family history of colon cancer. Dr. Kassab also recommended that decedent continue taking Metamucil.

On March 8, 2017, decedent underwent a colonoscopy with normal findings. It was recommended that plaintiff follow up with his primary care provider ("PCP) in two weeks, follow a high fiber diet, avoid constipation, and undergo a colorectal cancer screening in 10 years. The following day, a nursing telephone note documented that decedent denied pain, fever, "or N/V," and that decedent was tolerating a normal diet.

On April 27, 2017, Dr. Balzora saw decedent at Lincoln. Decedent's vitals were taken, however, there was no progress note by Dr. Balzora in decedent's medical records. The relevant diagnosis listed on Dr. Balzora's laboratory orders for blood work was "gastritis unspecified, without bleeding." Decedent was prescribed with Omeprazole and Metamucil.

On August 17, 2017, decedent presented to Lincoln with complaints of abdominal pain and acid reflux for four days. On August 24, 2017, decedent presented to Lincoln with complaints of stomach pain, and a stool test for H. Pylori was ordered. The laboratory report did not detect H. Pylori.

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[5] An EGD is an endoscopic procedure that examines the esophagus, stomach, and duodenum.
[6] A FIT tests for hidden blood in the stool, which can be an early sign of colon cancer.

During decedent's presentation at Lincoln on September 16, 2017, a CT scan of decedent's abdomen and pelvis revealed colitis in the rectum and distal sigmoid colon causing more proximal constipation. The distribution suggested possible ulcerative colitis. Decedent was discharged home with instructions to use Colace, and to follow up with his PCP.

On September 22, 2017, decedent saw Dr. Purcea in the medicine clinic with complaints of severe constipation, acid reflux, diffuse abdominal pain, urinary urgency, and a bitter taste in his mouth. Decedent denied diarrhea, bloody stools, fatigue, and weight loss. Decedent's physical examination was unremarkable, and Dr. Purcea noted that decedent had mild anemia, possibly nutritional. Dr. Purcea ordered a laboratory work up, and planned to refer decedent to GI if there was no improvement by decedent's next visit.

During decedent's presentation at Lincoln on September 25, 2017, decedent was diagnosed with "Constipation, unspecified, Gastritis, unspecified, without bleeding." Decedent was discharged home with instructions to follow up with urology, GI, and his PCP.

During decedent's follow up visit at Lincoln's urology clinic on September 29, 2017, decedent was diagnosed with an enlarged prostate and urinary tract symptoms. Decedent was scheduled for a cystoscopy on October 20, 2017.

On October 10, 2017, decedent saw Dr. Kassab for a GI consult. Decedent complained of left upper quadrant pain with vomiting three times weekly. Decedent also reported unintentional weight loss from 190 pounds to 176 pounds in two months. Dr. Kassab referred decedent for an EGD to rule out gastric malignancy.

On October 17, 2017, decedent underwent an EGD with biopsy without incident. The findings included generalized thickened gastric folds suspicious for underlying malignancy. A

pathology of the gastric antrum biopsy revealed chronic gastritis, and the body biopsy revealed gastric adenocarcinoma, poorly differentiated.

On October 19, 2017, decedent underwent a second colonoscopy at Lincoln, which showed "thickened colonic folds causing luminal narrowing as described above likely from infiltrative process." The biopsy findings included "hypemia of muscosa, focal changes of reactive pattern."

During plaintiff's presentation at Lincoln's oncology clinic on October 24, 2017, decedent's primary diagnosis was "Malignant neoplasm of overlapping sites of stomach Linitis Plastica[7] Poorly differentiated Adenocarcinoma."

On November 2, 2017, decedent presented to the surgical oncology clinic. Decedent had recently been admitted to New York Presbyterian/Cornell ("NYP") for three days for vomiting.

A biopsy of decedent's stomach at NYP on November 10, 2017 showed adenocarcinoma, poorly differentiated, with signet-ring cell features. Decedent's colon biopsy showed metastatic adenocarcinoma that was consistent with a spread from gastric primary. Decedent subsequently received chemotherapy at NYP. Surgery was not recommended. On June 16, 2019, decedent passed away.

Plaintiff alleges that defendants failed to, *inter alia*, timely diagnose and treat decedent's gastric adenocarcinoma, which caused decedent to die approximately one year and eight months after his diagnosis in October of 2017. Plaintiff contends that as a result of defendants' departures from the standard of care, decedent lost the opportunity for definitive treatment at an earlier time, which caused decedent's cancer grew and spread, worsened decedent's condition, and shortened decedent's lifespan.

[7] Linitis Plastica is a type of gastric cancer that originates in the glandular tissue lining the stomach walls.

ARGUMENTS

Based on the record before the court, defendants argue that summary judgment must be granted, because plaintiff cannot establish that defendants' medical treatment of decedent deviated from accepted standards of care or proximately caused decedent's alleged injuries.

In support of defendants' motion on behalf of Dr. Balzora, defendants annex the affirmation of GARY BURKE, M.D. ("Dr. Burke"), a physician board-certified in internal medicine.[8] Dr. Burke opines that Dr. Balzora comported with the standard of care by recommending appropriate treatment and/or further testing to investigate decedent's complaints on January 12, 2017. Specifically, Dr. Burke notes that Dr. Balzora first saw decedent on January 12, 2017 in his role as an attending internal medicine physician, and that Dr. Balzora properly documented decedent's complaints of epigastric pain and chronic constipation. Dr. Burke also points out that Dr. Balzora properly noted that decedent's complaints of epigastric pain had gotten progressively better with treatment, and that decedent's H. Pylori infection had resolved.

Similarly, Dr. Burke highlights that Dr. Balzora properly heeded decedent's complaints by recommending appropriate treatment and testing, including laboratory studies and/or diagnostic tests to investigate decedent's complaints. In that regard, Dr. Burke notes that on January 12, 2017, Dr. Balzora properly referred decedent to a GI specialist for a possible EGD for decedent's complaints of abdominal pain, and for a consideration of a FIT to screen for colon cancer. Dr. Burke also notes that Dr. Balzora properly encouraged decedent to pick up his Metamucil prescription to help with his complaints of constipation.

Dr. Burke further opines that contrary to plaintiff's assertion that Dr. Balzora failed to appreciate decedent's signs and symptoms "as suspicious of gastric adenocarcinoma," there were

[8] Because plaintiff does not oppose defendants' motion with respect to Dr. Purcea, the branch of Dr. Burke's affirmation that addresses Dr. Purcea will be omitted from the decision herein.

no indications or alarm signs during decedent's visits at the medicine clinic that decedent had an underlying gastric adenocarcinoma. According to Dr. Burke, during decedent's January 12, 2017 visit with Dr. Balzora, decedent denied unintentional weight loss, blood in the stool, vomiting, and nausea. As such, Dr. Burke concludes that in the absence of these alarm signs, and based on decedent's presenting complaints, Dr. Balzora, as an internist, would not have had reason to suspect a malignancy during decedent's visit.

Defendants also annex the affirmation of MATTHEW MCKINLEY, M.D. ("Dr. McKinley"), a physician board-certified in internal medicine and gastroenterology, on behalf of Dr. Kassab. Dr. McKinley opines that Dr. Kassab acted within the standard of care on February 23, 2017 and October 10, 2017 by recommending appropriate treatment and/or further testing to investigate decedent's complaints.

Specifically, Dr. McKinley highlights that when Dr. Kassab first saw decedent on February 23, 2017 for a GI consultation, Dr. Kassab properly noted decedent's complaints, including that decedent's epigastric pain had resolved after decedent's treatment for H. Pylori. Dr. McKinley also points out that Dr. Kassab properly headed decedent's complaints by referring decedent for a colonoscopy based on decedent's complaints of chronic constipation and family history of colon cancer. Dr. McKinley also highlights that Dr. Kassab properly encouraged decedent to continuing using Metamucil to help with his complaints of constipation.

Similarly, Dr. McKinley opines that Dr. Kassab comported with the standard of care during decedent's October 10, 2017 visit. Dr. McKinley highlights that Dr. Kassab properly ordered an EGD to screen for gastric malignancy due to decedent's complaints of new left upper quadrant pain, vomiting, and unintentional weight loss.

Dr. McKinley further opines that contrary to plaintiff's allegation that Dr. Kassab failed to appreciate decedent's signs and symptoms "as suspicious of gastric adenocarcinoma," there were no indications or alarm signs that decedent had an underlying gastric adenocarcinoma on February 23, 2017. According to Dr. McKinley, in the absence of alarm signs, and based on decedent's presenting complaints, Dr. Kassab did not have a reason to suspect a gastric malignancy during decedent's February 23, 2017 visit.

Finally, Dr. McKinley opines that contrary to plaintiff's allegations that Dr. Kassab failed to timely diagnose gastric adenocarcinoma, decedent's clinical prognosis and outcome would have been the same even if (1) decedent had gastric cancer as of February 23, 2017, (2) an EGD was performed on February 23, 2017, and (3) decedent's gastric cancer was identified on the EGD. According to Dr. McKinley, linitis plastica has a very poor prognosis regardless of the timing of the diagnosis as it is a carcinoma which infiltrates throughout the wall of the stomach and rapidly disseminates beyond the reach of surgical dissection. Dr. McKinley elaborates that because the disease is far advanced "at the time of diagnosis" in the vast majority of cases, curative options are severely limited.

In opposition, plaintiff annexes the affirmation of a physician board-certified in gastroenterology.[9] According to plaintiff's GI expert, Dr. Kassab departed from the standard of care during decedent's GI consultation on February 23, 2017,[10] which resulted in a delay in the

[9] As plaintiff has redacted the name of her gastroenterology expert, the expert will be referred to as "plaintiff's GI expert" herein.

[10] Specifically, plaintiff's GI expert notes that Dr. Kassab failed to 1) take a comprehensive history of decedent, 2) properly and thoroughly investigate decedent's upper abdominal and epigastric pain as reported by Drs. Balzora and Flynt on January 12, 2017, 3) properly review the records from decedent's January 12, 2017 visit with Drs. Balzora and Flynt, which included a progress note detailing decedent's complaints, the assessment and plan, and decedent's GI referral order, 4) perform a proper work-up for decedent's ongoing and recurring upper abdominal and epigastric pain as reported on January 12, 2017, which should have included an EGD or radiology imaging, and 5) render a differential diagnosis for decedent's upper abdominal pain, unspecified.

diagnosis and treatment of decedent's gastric adenocarcinoma linitis platica by approximately seven months.

Plaintiff's GI expert notes that on January 12, 2017, decedent was diagnosed with "upper abdominal pain, unspecified," and was referred to the GI clinic for ongoing and recurrent abdominal pain. Plaintiff's GI expert also highlights that while Dr. Kassab noted on February 23, 2017 that decedent's epigastric pain had resolved after completing treatment for H. Pylori in December 2016, there is no indication in decedent's progress note as to when the pain resolved although Dr. Kassab testified that the pain resolved on February 23, 2017. According to plaintiff's GI expert, "not having pain on a given day" does not mean that it was not necessary to further investigate decedent's upper abdominal and epigastric pain since decedent's pain was "recurrent" and "ongoing." Plaintiff's GI expert explains that recurring pain "keeps happening, intermittent, and may not be present every day, but that does not necessarily mean it is completely resolved." In that regard, plaintiff's GI expert points out that on November 5, 2017, decedent reported that his pain had been present for many years, which would make the pain "somewhat chronic."

Additionally, plaintiff's GI expert opines that because decedent was referred to the GI clinic for recurring and ongoing upper abdominal and epigastric pain that was still present after his H. Pylori infection had resolved, Dr. Kassab departed from the standard of care by failing to take a comprehensive history of decedent on February 23, 2017 to investigate his complaints of upper abdominal and epigastric pain. According to plaintiff's GI expert, based on decedent's GI referral and progress note, a comprehensive history of decedent would require Dr. Kassab to ask further questions about decedent's upper abdominal and epigastric pain, such as when the pain started, how often decedent had pain, and when decedent last experienced pain after his treatment for H. Pylori. As such, plaintiff's GI expert concludes that Dr. Kassab's failure to take a

comprehensive history of decedent resulted in an incomplete history, evaluation, and assessment of decedent's upper abdominal and epigastric pain. Plaintiff's GI expert further maintains that because recurring pain may not be present every day, Dr. Kassab could not make an appropriate determination as to whether an EGD or further work-up was indicated without taking a comprehensive history of decedent.

Plaintiff's GI expert also opines that Dr. Kassab departed from the standard of care by not ordering a further work-up for decedent on February 23, 2017, which should have included an EGD or radiological studies, such as a CT scan or abdominal ultrasound. Plaintiff's GI expert reiterates that while Dr. Kassab testified that decedent's epigastric pain had resolved on February 23, 2017, the fact that plaintiff did not experience pain that day does not necessarily mean that the pain had completely resolved. In that regard, plaintiff's GI expert notes that decedent had upper abdominal and epigastric pain when he presented to the medical clinic on January 12, 2017, which was after his H. Pylori infection had cleared, and that decedent's October 10, 2017 progress note indicated that decedent mentioned epigastric pain at his previous GI visit. Plaintiff's GI expert also highlights that decedent testified that he had the same complaints at his follow-up appointment after his first colonoscopy, and that Dr. Kassab's February 23, 2017 order for a colonoscopy listed a diagnosis of "Upper abdominal pain, unspecified."

According to plaintiff's GI expert, the differential diagnosis for mid-upper abdominal pain includes, *inter alia*, bloating, pancreatitis, peptic ulcer disease, appendicitis, which decedent probably did not have, and irritable bowel syndrome, which is more a functional change in the bowels like gas. In that regard, plaintiff's GI expert posits that if there was a concern for upper abdominal pain, then peptic ulcer should have been included in the differential diagnosis since decedent had a background of H. pylori, which is associated with stomach ulcers. As such,

plaintiff's GI expert concludes that since upper abdominal pain was the diagnosis for decedent's colonoscopy, an upper endoscopy should have also been considered since a peptic ulcer would have been an appropriate differential diagnosis.

Ultimately, plaintiff's GI expert opines that Dr. Kassab's departures caused and contributed to the delay in the diagnosis and treatment of decedent's gastric adenocarcinoma linitis plastica. According to plaintiff's GI expert, decedent's cancer could have been diagnosed at an earlier stage of the disease had an upper endoscopy been performed on or about February 23, 2017.

Plaintiff's GI expert also opines that Dr. Balzora departed from the standard of care by failing to document the findings of decedent April 27, 2017[11] examination, failing to properly diagnose and confirm his diagnosis of "gastritis" on April 27, 2017, and by failing to refer decedent back to GI on April 27, 2017 for a re-evaluation and further work up. Plaintiff's GI expert highlights that on April 27, 2017, decedent was diagnosed with "gastritis," which can only be confirmed by a pathologist who examines the tissues obtained during an upper endoscopy. According to plaintiff's GI expert, if gastritis was suspected on April 27, 2017 based on decedent's symptoms, Dr. Balzora should have referred decedent back to GI for a re-evaluation and proper workup, including an endoscopy to confirm the diagnosis of gastritis, or to rule out any other differential diagnoses. In that regard, plaintiff's GI expert concludes that Dr. Balzora's departures caused an approximately six-month delay in the diagnosis and treatment of decedent's gastric adenocarcinoma linitis plastica.

[11] Plaintiff's GI expert notes that Dr. Burke does not address decedent's April 27, 2017 visit, but only states that after decedent's January 12, 2017 visit, "Dr. Balzora referred plaintiff for consultations and prescribed medications until plaintiff's diagnosis with Linitis Plastica in October of 2017."

Additionally, plaintiff annexes the affirmation of an expert board-certified in medical oncology and internal medicine.[12] According to plaintiff's MO/IM expert, when decedent presented to Dr. Balzora on January 12, 2017 with complaints of persistent residual abdominal pain, Dr. Balzora appropriately referred decedent to a GI specialist for the purpose of undergoing an EGD to evaluate other etiologies of decedent's stomach pain. However, plaintiff's MO/IM expert asserts that Dr. Balzora departed from the standard of care because he was aware that decedent had not received an EGD although his abdominal pain persisted "albeit undiagnosed" on April 27, 2017. According to plaintiff's MO/IM expert, Dr. Balzora was aware of decedent's symptoms since he had prescribed decedent with anti-acid medication, and therefore, it was Dr. Balzora's responsibility to ensure that decedent underwent an EGD since the likelihood of malignancy was high on the differential based on decedent's persistent abdominal pain despite successful treatment of his H. pylori infection.

Plaintiff's MO/IM expert also opines that Dr. Kassab's February 27, 2017 evaluation of decedent was insufficient as Dr. Kassab did not perform a proper physical examination of decedent, or conduct a guaiac test although decedent was still experiencing stomach pain. Plaintiff's MO/IM expert also contends that decedent saw Dr. Kassab on February 23, 2017 pursuant to Dr. Balzora's referral due to decedent's complaints of upper abdominal pain, however, Dr. Kassab "dismissed" the "explicit reason" for decedent's GI referral, which was to evaluate for decedent's persistent abdominal pain. In that regard, plaintiff's MO/IM expert avers that the anesthesiologist for decedent's March 8, 2017 colonoscopy indicated that the reason for the GI procedure was to screen for colon cancer and upper abdominal pain, which confirms that decedent's ongoing symptoms of abdominal pain were communicated to the GI team, as was the

[12] As plaintiff has redacted the name of this expert, the expert will be referred to as "plaintiff's MO/IM expert" herein.

need for an endoscopic evaluation. However, plaintiff's MO/IM expert highlights that an endoscopic evaluation was not performed.

In plaintiff's MO/IM expert's opinion, defendants inappropriately managed decedent's persistent abdominal pain, and that as a result, there was a delay in the diagnosis and treatment of decedent's linitis plastica stomach cancer. Specifically, plaintiff's MO/IM expert maintains that due to Dr. Kassab's departures, and decedent not receiving an EGD by March 8, 2017, decedent's stomach cancer went unnoticed and undiagnosed for seven months, which significantly advanced the disease, and impacted decedent's morbidity and mortality. According to plaintiff's MO/IM expert, had decedent's cancer been diagnosed earlier, the cancer would more likely than not been amendable to surgical intervention, and decedent would have been more responsive to adjuvant chemotherapy treatment, resulting in longer survival. However, plaintiff's MO/IM expert explains that given the nature of the malignancy, the period of six-to-seven months more likely than not allowed the cancer to grow, which limited decedent's treatment options, and the extent of decedent's response to treatment.

In reply, defendants argue that plaintiff's experts' opinions that Dr. Balzora failed to confirm decedent's diagnosis of gastristis, failed to document the findings of his April 27, 2017 examination, and failed to refer decedent back to GI should be disregarded because they were not alleged in plaintiff's bill of particulars. Defendants also contend that plaintiff has not proffered any evidentiary basis to establish that Dr. Balzora was under a duty to confirm a diagnosis of "gastritis unspecified," or that it was a departure for LPN Beckford to record the notes instead of Dr. Balzora.

Defendants also reiterate that Dr. Kassab testified that she was aware of decedent's prior medical history and complaints of pain, and that she used her clinical judgment in determining which diagnostic tests were warranted as of February 23, 2017. In that regard, defendants

reemphasize that Dr. Kassab took a comprehensive history of decedent, and determined that an EGD was not warranted at that time. Defendants further underscore that when decedent complained of new left upper quadrant pain, vomiting, and unintentional weight loss on October 10, 2017, Dr. Kassab properly noted that an EGD was indicated to rule out gastric malignancy. Moreover, defendants maintain that plaintiff speculates without proof that decedent had gastric cancer on February 23, 2017, and that had an EGD or other diagnostic testing been performed as of February 23, 2017, decedent's alleged gastric cancer would have been identified.

Finally, defendants argue that plaintiff's claim for negligently hiring/credentialing must be dismissed because plaintiff has not provided any evidence that Lincoln or NYCHHC negligently hired or retained their staff, and because plaintiff has simultaneously alleged that Lincoln and NYCHHC are vicariously liable for the negligent acts of its agents, servants, and employees.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 A.D.3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g.*, *Joyner-Pack v. Sykes*, 54 A.D.3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 A.D.3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 A.D.3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see, Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, defendants set forth separate *prima facie* showings in favor of dismissal, as evidenced by the submission of defendants' medical records, and defendants' expert affidavits, all of which attest to the fact that defendants' treatment of decedent was in accordance with accepted standards of care and did not proximately cause decedent's alleged injuries. To be sure, defendants' expert affirmations are detailed and predicated upon ample evidence within the record. As defendants have made a *prima facie* showing, the burden shifts to plaintiff.

As a preliminary matter, defendants' argument that the court should disregard plaintiffs' assertions that Dr. Balzora failed to confirm decedent's diagnosis of gastritis, failed to document the findings of his April 27, 2017 examination, and failed to refer decedent back to GI because they were not alleged in plaintiff's bill of particulars is without merit. Contrary to defendants' contention, the allegations in plaintiff's bill of particulars are sufficient to encompass the specific arguments outlined in plaintiff's opposition papers. Moreover, plaintiff's bill of particulars alleges that defendant departed from the standard of care "in failing to timely and properly refer [decedent] back to the gastroenterology clinic, including after [decedent's] visit on February 23, 2017, and

following his colonoscopy on March 8, 2017." Accordingly, the court will consider all arguments raised in plaintiff's opposition papers.

Notwithstanding the same, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment. Notably, plaintiff's experts do not raise any issues of fact with respect to Dr. Balzora's treatment of decedent on January 12, 2017. However, while plaintiff asserts that Dr. Balzora failed to confirm decedent's diagnosis of gastritis, failed to document the findings of his April 27, 2017 examination, and failed to refer decedent back to GI on April 27, 2017, plaintiff does not show how these alleged departures caused or contributed to a six-month delay in the diagnosis and treatment of decedent's cancer (*see, Shekhtman v. Savransky*, 154 A.D.3d 592, 593 [1st Dept. 2017] ["Liability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice."]; *Kaplan v. Hamilton Med. Assocs., P.C.*, 262 A.D.2d 609, 610 [2d Dept. 1999] [granting defendants summary judgment where plaintiff's expert "merely stat[ed] in conclusory terms that [defendants] should have diagnosed and treated his bacterial endocarditis sooner"]).

Indeed, neither of plaintiff's experts opine as to whether decedent had linitis plastica as of January 12, 2017 or April 27, 2017, or set forth any basis for their opinion that decedent's cancer could have been diagnosed six-to-seven months earlier. To be sure, both experts' affirmations are devoid of any mention as to the respective staging of decedent's cancer during each of decedent's visits with Dr. Balzora, or what decedent's treatment options and outcome would have been respective to the stage of the cancer (*Shekhtman*, 154 A.D.3d at 593, *supra* ["[P]laintiff's experts failed to specify when Marmur's cancer would have been diagnosable, yet still treatable, making their opinions pure speculation insufficient to support the jury's finding of causation."]).

Moreover, even if Dr. Balzora had referred decedent back to GI for a re-evaluation and proper workup as plaintiff suggests, there is no showing that the GI specialist would have ordered or performed an endoscopy at that time, or that the endoscopy, if performed, would have detected cancer (*see, Rodriguez v. Montefiore Med. Ctr.*, 28 A.D.3d 357, 357 [1st Dept. 2006] [granting summary judgment where "plaintiff's expert offered only conclusory assertions and mere speculation that her cancer would have been discovered earlier and would not have spread if appellants had more aggressively pursued her, and expedited and tracked her follow-up visits more actively"]). Accordingly, Dr. Balzora is entitled to summary judgment as a matter of law.

Similarly, while plaintiff asserts that Dr. Kassab departed from the standard of care by failing to take a comprehensive history of decedent on February 23, 2017 to investigate decedent's complaints of upper abdominal and epigastric pain, plaintiff fails to demonstrate what a more comprehensive history would have shown, or what effects a more comprehensive history would have had on decedent's diagnosis, treatment, and outcome (*see, id.*).[13] For instance, even if Dr. Kassab had asked decedent further questions about his upper abdominal and epigastric pain, such as when the pain started, how often decedent had pain, and when decedent last experienced pain after his treatment for H. Pylori, plaintiff does not establish that the answers to these questions would have necessarily resulted in further testing and studies such as an EGD, CT scan, or abdominal ultrasound. Furthermore, plaintiff fails to show that results of these tests would have revealed cancer, or that even if the tests had detected cancer, that it would have altered decedent's treatment or outcome (*see, Shekhtman*, 154 A.D.3d at 593, *supra* ["P]laintiff's experts testified that Marmur should have been referred for "further" testing, but failed to specify what test, at what

[13] Again, plaintiff's experts do not opine that decedent had linitis plastica as of February 23, 2017, but only speculates that defendants delayed in the diagnosis and treatment of decedent's cancer by six-to-seven months.

time, would have revealed her cancer, which was of a type all experts agreed was aggressive and difficult to diagnose."]).

Likewise, plaintiff fails to demonstrate how Dr. Kassab's alleged failure to perform a proper physical examination or guaiac test caused or contributed to a delay in the diagnosis of decedent's cancer. Indeed, plaintiff does not show what a "proper" physical examination or guaiac test would have revealed, or whether these tests would have altered decedent's treatment or outcome (*id.*).

Furthermore, while plaintiff pivots her main argument on defendants' alleged failure to order, perform, or ensure that decedent underwent an EGD based on decedent's complaints of upper abdominal and epigastric pain,[14] plaintiff's experts have not proffered any evidence to show that decedent had linitis plastica as of January 12, 2017, February 23, 2017, or April 27, 2017, or the stage of decedent's cancer at each respective date.[15] Plaintiff also fails to indicate what the EGD would have shown, what treatment options would have been available at the time of the EGD, or whether treatment at an earlier time would have altered or changed decedent's outcome (*see, Biondi v. Behrman*, 149 A.D.3d 562, 565 [1st Dept. 2017] [granting defendants summary judgment where plaintiff's expert did not explain how pre-surgical testing would have changed the

[14] While decedent may have had ongoing and recurrent epigastric pain, plaintiff fails to establish a causal nexus between decedent's complains and defendants' alleged failure to diagnose decedent's stomach cancer. To be sure, plaintiff only asserts in a vague, conclusory, and speculative manner that decedent's gastric adenocarcinoma linitis plastica could have "potentially been diagnosed at an earlier stage of the disease" had an upper endoscopy been performed on or about February 23, 2017.

[15] Notably, plaintiff does not dispute defendants' experts' opinions that there were no indications or alarm signs that decedent had an underlying gastric adenocarcinoma during decedent's visits with Drs. Balzora and Kassab on January 12, 2017 and February 23, 2017, respectively (*see e.g., Graziano v. Cooling*, 79 A.D.3d 803, 805 [2d Dept. 2010] [granting defendants summary judgment where plaintiff's expert did not assert that "plaintiff exhibited key symptoms such as photophobia and neck stiffness, or other 'cardinal signs,' which would have led to a diagnosis of meningococcal meningitis prior to the afternoon of September 29, 2004."]; *Grzelecki*, 2 A.D.3d 939, 941 [3d Dept. 2003] [granting defendants summary judgment where plaintiff's expert failed to "identify symptoms upon which a diagnosis of severe depression could have been made and do not provide a causal nexus between the alleged malpractice and decedent's suicide"]).

result, and advanced only conclusory opinions that a specific infection was somehow the cause of her injuries]; *Shekhtman*, 154 A.D.3d at 593, *supra; Curry v. Dr. Elena Vezza Physician, P.C.*, 106 A.D.3d 413, 414 [1st Dept. 2013]; *Rodriguez*, 28 A.D.3d at 357, *supra*).

By contrast, defendants have proffered undisputed evidence that decedent's clinical prognosis and outcome would have been the same even if an EGD had been performed on February 23, 2017, and even if defendants had diagnosed decedent with gastric cancer as of February 23, 2017, since linitis plastica has a poor prognosis regardless of the timing of the diagnosis. Based on plaintiff's failure to raise a triable issue of fact, summary judgment is granted in defendants' favor as a matter of law.

As summary judgment is granted in defendants' favor, plaintiff's claims for negligently hiring/credentialing and vicarious liability are dismissed.

As plaintiff does not oppose defendants' motion with respect to plaintiff's claims for lack of informed consent and spoliation of defendants' 2015 records, both claims are dismissed.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendants, and dismissing this case accordingly.

This constitutes the decision and order of the court.

Dated: April 28, 2020

HON. GEORGE J. SILVER