

**Georges v Amar**

2024 NY Slip Op 34368(U)

December 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 511383/19

Judge: Ellen M. Spodek

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of December, 2024.

**P R E S E N T:**

HON. ELLEN M. SPODEK, Justice.

-----X

YVINNS GEORGES,

Plaintiff,

- against -

**DECISION AND ORDER**  
Index No. 511383/19

Mot. Seq. No. 4

SHAZIA AMAR, D.P.M.,  
IAN BARKER M.D., D.P.M.,  
NEW YORK-PRESBYTERIAN BROOKLYN  
METHODIST HOSPITAL,  
RICHARD G. REISH, M.D., and  
LONG ISLAND PLASTIC SURGICAL GROUP, P.C.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits Annexed. . . . .	<u>83-110</u>
Affirmation (Affidavit) in Opposition and Exhibits Annexed . .	<u>147-149</u>
Reply Affirmation. . . . .	<u>164</u>
Supplemental Bill of Particulars. . . . .	<u>70</u>

In this action to recover damages for podiatric malpractice and lack of informed consent, defendants Shazia Amar, D.P.M. (“Dr. Amar”), and New York-Presbyterian Brooklyn Methodist Hospital (“Methodist” and collectively with Dr. Amar, “defendants”) jointly move for summary judgment dismissing all claims against them. Plaintiff Yvinns Georges (“plaintiff”) failed to address or specifically oppose the branch of defendants’ motion which seeks summary judgment dismissing plaintiff’s second cause of action sounding in lack of informed consent. *See Clarke v New York City Health & Hosps.*, 210 AD3d 631, 633 (2d Dept 2022); *Elstein v Hammer*, 192 AD3d 1075, 1080 (2d Dept 2021).

The remainder of this Decision and Order addresses plaintiff's first cause of action sounding in podiatric malpractice against defendants.<sup>1</sup>

On October 16, 2015, plaintiff underwent an ambulatory, same-day surgery at Methodist for the removal of two "discrete soft tissue masses measuring approximately 1 cm in diameter and approximately 2 cm apart" from the plantar aspect of his right foot.<sup>2</sup> At the time of the surgery plaintiff was 57 years old and walked without assistance. In the course of surgery, "both lesions were excised in their entirety[,] full thickness down to subcutaneous tissue."<sup>3</sup> Post-removal of the lesions, the surrounding "subcutaneous tissue was reapproximated using 3-0 Vicryl [an absorbable suture,] and then the incisions were approximated using 4-0 Prolene [a non-absorbable suture]. Postoperative dressings consisted of Xeroform [a type of dressing], 4 x 4 gauze, Kling [a bandage], Kerlix [another type of bandage], and Ace wrap [, all of which were] applied to [plaintiff's] right foot."<sup>4</sup> The plaintiff was told to be non-weight bearing on his right foot following the surgery and to use crutches. He was given crutches at Methodist and was trained on how to use them. He was also told not to get the dressing wet until the sutures were removed.

---

<sup>1</sup> Defendants Richard G. Reish, M.D., and Long Island Plastic Surgical Group, P.C., were dismissed from this action by way of their unopposed summary judgment motion in Seq. No. 5. Remaining defendant Ian Barker, D.P.M. (incorrectly sued herein as Ian Barker, M.D., D.P.M.), was dismissed from this action by Stipulation of Discontinuance, dated August 2, 2023 (NYSCEF Doc No. 160). Dr. Barker's motion in Seq. No. 6 to "so order" the aforesaid stipulation was withdrawn as moot. *See* Order, dated August 15, 2024 (NYSCEF Doc No. 166), which resolved both motions.

<sup>2</sup> Dr. Amar's records (NYSCEF Doc No. 94) at 000024 (Report of Operation, dated October 16, 2015, at 2).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

At the first post-operative visit to Dr. Amar, on October 29, 2015 (plaintiff missed his first scheduled appointment on October 22), plaintiff presented with the surgical shoe, and was “fully weightbearing on his right foot . . . with no assistive devices, contrary to both Dr. Amar’s instructions and [Methodist’s] discharge instructions.” At every subsequent post-operative visit to Dr. Amar (for a total of eight additional post-operative visits following his first post-operative visit on October 29, 2015), plaintiff presented full weight-bearing on his right foot.

Approximately two years later on November 16, 2017, plaintiff commenced the instant action against defendants (among others) alleging, in essence, that defendants were negligent (and thereby caused him to undergo additional, but otherwise avoidable, surgeries) because they failed to: (1) advise him to avoid “all” active weightbearing following surgery; (2) instruct him that he must remain “completely” non-weight-bearing following surgery; and (3) adequately explain to him the absolute necessity of avoiding “all” weight-bearing so as to minimize his risk of the incision breakdown.<sup>5</sup>

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact.” *Goldin Real Estate, LLC v Shukla*, 227 AD3d 674, 676 (2d Dept 2024). “Upon a motion for summary judgment, the court’s role is limited to one of issue finding rather than issue determination.” *Goldin Real Estate*, 227 AD3d at 676. “It is not the function of a court . . . to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack

---

<sup>5</sup> Plaintiff’s Supplemental Bill of Particulars as to both defendants, dated November 28, 2023, ¶ 1 (NYSCEF Doc No. 70).

thereof.” *Matter of Salvatore L. Olivieri Irrevocable Tr.*, 208 AD3d 489, 491 (2d Dept 2022) (internal quotation marks omitted). “The requisite elements of proof in a podiatric malpractice action are a deviation or departure from accepted community standards of [podiatric] practice and evidence that such departure was a proximate cause of injury or damage.” *Templeton v Papathomas*, 208 AD3d 1268, 1270 (2d Dept 2022). “Thus, on a motion for summary judgment, a defendant doctor must make a prima facie showing that there was no departure from good and accepted [podiatric] practice or that his or her acts were not a proximate cause of any injury to the plaintiff.” *Id.* “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *Idi Jewels, Inc. v Abramov*, 193 AD3d 699, 699 (2d Dept 2021) (internal quotation marks omitted). Where a defendant makes a prima facie showing, “the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden.” *Quinones v Winthrop Univ. Hosp.*, 230 AD3d 1170, 1171 (2d Dept 2024) (internal quotation marks omitted). “To rebut the defendant’s prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert’s allegations.” *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 (2d Dept 2021). “Summary judgment is not appropriate in a medical [or podiatric] malpractice action where the parties adduce conflicting medical expert opinions.” *Gardiola v Sung Chui Park*, 229 AD3d 602, 603 (2d Dept 2024). “Such credibility issues can only be resolved by a jury.” *Feinberg v Feit*, 23 AD3d 517, 519 (2d Dept 2005).

Here, defendants have failed to meet their prima facie burden on both the departure and the causation elements of plaintiff's podiatric malpractice claim. Contrary to the opinion of defendants' podiatric expert, Michael J. Trepal, D.P.M., the post-operative patient instructions on non-weight-bearing, as submitted in support of their motion, have failed to eliminate triable issues of fact as to: (1) whether Dr. Amar and/or Methodist's personnel properly conveyed to plaintiff how critical it was for him post-operatively to avoid "all" active weight-bearing, to remain "completely" non-weight-bearing, and to avoid "all" weight-bearing; and (2) whether such failures (individually and in combination) proximately caused or contributed to his alleged injuries. *See Vargas v Lee*, 207 AD3d 684, 685-686 (2d Dept 2022); *see also Johnson v Auburn Community Hosp.*, 211 AD3d 1511, 1512 (4th Dept 2022); *Almonte v Shaukat*, 204 AD3d 402, 404 (1st Dept 2022).

The defense expert's two-part argument on the absence of causation is self-contradictory and factually unsupported. As his starting point, Dr. Trepal (in ¶ 28 of his affirmation) faults plaintiff for presenting to "Dr. Amar's office at the first post-operative visit [on October 29, 2015] . . . fully weightbearing on his right foot . . . with no assistive devices, contrary to both Dr. Amar's instructions and [Methodist's] discharge instructions." Against this backdrop, however, Dr. Trepal (in ¶ 29 of his affirmation) buys into a portion of plaintiff's pretrial testimony that "he remained full non-weight[-]bearing on crutches." In so crediting a portion of plaintiff's pretrial testimony, the defense expert overgeneralizes it without a sufficient factual foundation. Plaintiff never testified that he was "full non-weight[-]bearing on crutches" for the entirety of his nine post-operative visits with Dr. Amar from October 29, 2015 to December 12, 2016. Rather, plaintiff testified

only that he was non-weight-bearing for the single interval between surgery and his first post-operative visit.<sup>6</sup>

In any event, plaintiff has raised triable issues of fact by way of his expert's opinions that defendants (individually and in combination) failed to recognize and to inform plaintiff that: (1) "[p]lantar incisions must be off weight or with crutches only or negative heel shoes with crutches. No exceptions"; and (2) the ensuing "wound dehiscence[,] infection[,] and need for further surgeries were caused by the failure . . . to strictly prohibit any form of weight-bearing."<sup>7</sup> See *Hanna v Staten Is. Univ. Hosp.*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 05435, \*2 (2d Dept 2024); *Armond v Strangio*, 227 AD3d 758, 760 (2d Dept 2024).

It is true, as defendants assert in ¶¶ 31-35 of their reply affirmation, that plaintiff's expert's additional theory of liability that Dr. Amar failed to use a proper medication on plaintiff's "moist wound at the post-surgical visit . . . to dry the area and prevent further dehiscence" may not be considered by the Court for the first time in opposition to their motion. See e.g. *Bacalan v St. Vincent's Catholic Med. Ctrs. of N.Y.*, 179 AD3d 989, 992 (2d Dept 2020). The Court's rejection of plaintiff's additional theory of liability, however, does not affect the underlying determination.

---

<sup>6</sup> See Plaintiff's EBT transcript at page 67, lines 25 to page 68, line 8 (testifying that he was using crutches and was not putting any weight on his right foot at any point in time between surgery and his first post-operative visit to Dr. Amar). Compare plaintiff's EBT transcript at page 76, line 13 to page 77, line 5 (testifying that he was using crutches but touching the ground lightly with his right foot between his second and third post-operative visits). Compare further plaintiff's EBT transcript at page 50, lines 2-25 (testifying that a Methodist employee gave him crutches "as a form of support" so that he would not "put too much effort on [his right] foot"); page 51, lines 11-12 (testifying that "[b]ecause the surgery just happened, [he] could not put strain on the [right] foot"); page 112, line 23 to page 113, line 22 (testifying that Dr. Amar gave him a cane after surgery and that he used the cane for support when visiting her office); page 114, lines 2-19 (testifying that he also used the cane at home as needed).

<sup>7</sup> Physician's Affirmation, dated June 11, 2024, ¶¶ 9 and 12, at page 4 (NYSCEF Doc No. 148).

Contrary to defendants' position, the affirmation of plaintiff's expert sufficiently laid a foundation for the expert's opinions and demonstrated that he or she has the "requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." *Gordon v Zeitlin*, 230 AD3d 1232, 1234 (2d Dept 2024) (internal quotation marks omitted). Defendants' argument that plaintiff's expert, an ankle and foot surgeon, is incompetent to offer an opinion on the care of plaintiff, who suffered complications allegedly stemming from the lack of adequate patient instructions following a podiatric surgery, is unpersuasive. *See Mezzone v Goetz*, 145 AD3d 573, 574 (1st Dept 2016), *lv dismissed* 29 NY3d 1074 (2017). Further, any alleged lack of skill or expertise that plaintiff's expert may have goes to the weight of his or her opinion as evidence and not to its admissibility. *See Gordon*, 230 AD3d at 1234.<sup>8</sup>

The Court considered defendants' remaining contentions and found them to be without merit.

Based on the foregoing, it is hereby

**ORDERED** that defendants' motion for summary judgment is granted to the extent that plaintiff's second cause of action for lack of informed consent is dismissed without opposition, and the remainder of their motion is denied; and it is further

---

<sup>8</sup> Plaintiff's counsel's prior submission of an unredacted version of his expert's affirmation to the Court's chambers rendered moot defendants' remaining procedural concern that was raised in ¶¶ 9-10 of their counsel's reply affirmation.



**ORDERED** that to reflect the prior dismissal of other defendants from this action, the caption is amended to read in its entirety, as follows:

-----X  
YVINNS GEORGES,

Plaintiff,

- against -

Index No. 511383/19

SHAZIA AMAR, D.P.M., and  
NEW YORK-PRESBYTERIAN BROOKLYN  
METHODIST HOSPITAL,

Defendants.

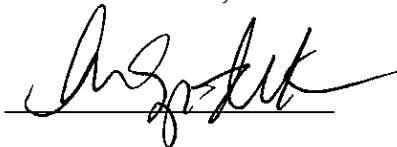
-----X

; and it is further

**ORDERED** that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,



J. S. C.

HON. ELLEN M. SPODEK

2024 DEC 16 A 9:50  
KINGS COUNTY CLERK  
FILED