

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 11th day of June 2021.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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RODRIGUEZ MOORE,

Plaintiff,

Index. No. 4104/2015

-against-

DECISION/ORDER

VLADIMIR VOLOKH, M.D., MICHAEL KRICKELLAS, M.D., NANA MAKALATIA, M.D., ANTON ROSTOVSKY, M.D., "JOHN DOE", M.D. #1 (name being fictitious, presently unknown and meant to represent a doctor who treated plaintiff at New York Trades Council Brooklyn Health Center), NEW YORK TRADES COUNCIL BROOKLYN HEALTH CENTER, BROOKLYN HEIGHTS IMAGING, COREY WEINER, M.D., "JOHN DOE", M.D. #2 (name being fictitious, presently unknown and meant to represent doctor who treated plaintiff at Brooklyn Heights Imaging) and LIBERATO SALVATORE, M.D.,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	<u>Numbered</u>
Notice of Motion and Affirmation in Support.....	1
Affirmation in Opposition.....	2
Affirmation in Reply.....	3

In this action for medical malpractice, defendants Brooklyn Heights Imaging ("Brooklyn Heights") and Corey Weiner, M.D. ("Dr. Weiner"), move, in motion sequence #16, for an order, pursuant to CPLR 3212, for summary judgment dismissing the summons and complaint insofar as asserted against them.

“A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact 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.” *Russell v. Garafalo*, 189 A.D.3d 1100, 136 N.Y.S.3d 317 (2d Dept. 2020); *See Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). “Where a defendant makes a prima facie showing on both elements, ‘the burden shifts to the plaintiff to rebut the defendant’s showing by raising a triable issue of fact as to both the departure element and the causation element.’” *Russell*, 189 A.D.3d 1100 quoting *Gilmore v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504 (2d Dept. 2019); *See Stukas*, 83 A.D.3d 18.

The movants establish their prima facie entitlement to summary judgment through, *inter alia*, medical records, deposition testimony, and the expert opinion of their board-certified radiologist, Mark Novick, M.D. (“Dr. Novick”). Specifically, Dr. Novick opined that the movants did not depart from the standard of care since the findings of the properly performed contrast study were unremarkable and gave no indication of an abnormality in plaintiff’s stomach. Regarding causation, Dr. Novick opined that neither movant caused nor contributed to the misdiagnosis of stomach adenocarcinoma since the study performed by Dr. Weiner was not the test customarily used to rule out stomach cancer. Further, Dr. Novick agreed with co-defendant Nana Makalatia, M.D., who testified that a “negative, normal upper GI series doesn’t exclude diagnosis of ulcer or malignancy.” (NYSCEF Doc. No. 28, Makalatia Tr at 41).

In opposition, plaintiff submits the affirmations of his board-certified radiologist, Jordan Haber, M.D. and board-certified oncologist, Richard Hirschman, M.D. Although plaintiff’s experts opine as to departure and causation, their submissions are insufficient to rebut

defendants' evidence of the lack of causation. Indeed, neither expert specifically addressed Dr. Novick's opinion regarding the contrast study's inability to rule out stomach cancer. *See Jacob v. Franklin Hospital Medical Center*, 135 N.Y.S.3d 430, 188 A.D.3d 838 (2d Dept. 2020); *Lyakhovich v. Vernov*, 185 A.D.3d 566, 126 N.Y.S.3d 711 (2d Dept. 2020); *Wagner v. Parker*, 172 A.D.3d 954, 100 N.Y.S.3d 280 (2d Dept. 2019); *Gilmore*, 174 A.D.3d 686. Moreover, neither expert addresses co-defendant Dr. Makalatia's deposition testimony regarding same. *See Abakpa v. Martin*, 132 A.D.3d 924, 19 N.Y.S.3d 303 (2d Dept. 2015); *Schofield v. Borden*, 117 A.D.3d 936, 986 N.Y.S.2d 215 (2d Dept. 2014); *Keitel v. Kurtz*, 54 A.D.3d 387, 866 N.Y.S.2d 195 (2d Dept. 2008); *Ventura v. Beth Israel Medical Center*, 297 A.D.2d 801, 747 N.Y.S.2d 595 (2d Dept. 2002). Furthermore, Dr. Haber's opinion that a properly performed contrast study would have changed the outcome is premised on a string of assumptions. Particularly, Dr. Haber opined that a properly performed contrast study would have resulted in better visualization of the mucosal pattern, which would have led to its realization by Dr. Weiner, which would have led to a request for an upper endoscopy and, ultimately, a timely diagnosis. *See Kiernan v. Arevalo-Valencia*, 184 A.D.3d 727, 126 N.Y.S.3d 205 (2d Dept. 2020); *Capobianco v. Marchese*, 125 A.D.3d 914, 4 N.Y.S.3d 127 (2d Dept. 2015); *Shahid v. New York City Health & Hospitals Corp.*, 47 A.D.3d 800, 850 N.Y.S.2d 519 (2d Dept. 2008); *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 (2d Dept. 2005). Additionally, Dr. Hirschman's opinion that plaintiff had stage 1B stomach cancer at the time of the contrast study is not supported by any evidence in the record. *See Pichardo v. Herrera-Acevedo*, 77 A.D.3d 641, 908 N.Y.S.2d 446 (2d Dept. 2010); *Shister v. City of New York*, 63 A.D.3d 1032, 882 N.Y.S.2d 224 (2d Dept. 2009).

Therefore, no basis exists for proceeding against Brooklyn Heights under a vicarious liability theory for the malpractice of its employee, Dr. Weiner. *See Samer v. Desai*, 179 A.D.3d

860, 116 N.Y.S.3d 377 (2d Dept. 2020); *Feuer v. Ng*, 136 A.D.3d 704, 24 N.Y.S.2d 198 (2d Dept. 2016).

Accordingly, defendants' motion for summary judgment is granted. The complaint is dismissed as against Brooklyn Heights Imaging and Corey Weiner, M.D. The caption is amended as follows:

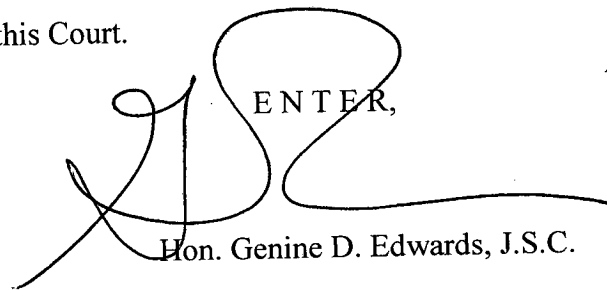
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Defendants.
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This constitutes the Decision of this Court.

ENTER,

Hon. Genine D. Edwards, J.S.C.