

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, JAMES P. DOLLARD IAS PART 13
Justice

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PATRICIA LAWRENCE,

Index No.: 26597/01

Plaintiff,

Motion Date: 7/7/04

-against-

Cal. No.: 22

DANIEL CHI-CHOW KUO, M.D.
and FLUSHING HOSPITAL and
MEDICAL CENTER,

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendant Flushing Hospital Medical Center s/h/a Flushing Hospital and Medical Center (Flushing Hospital) for an order granting summary judgment dismissing the complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 7
Reply Affirmation.....	8 - 9

Upon the foregoing papers it is ordered that this motion is granted.

The moving defendant acknowledges that the instant motion is untimely and pleads the "good cause" standard outlined in the recent Court of Appeals decision of (Brill v. City of NY, 2004 WL 1263754. In Brill the court concluded that "good cause" as defined by CPLR 3212(a)) "[r]equires a showing of good cause for the delay in making the motion, a satisfactory explanation for the untimeliness rather than simply permitting meritorious, non-prejudicial filings, however tardy". The defendant Flushing Hospital's counsel explains in his affirmation that the instant motion was previously dismissed on several occasions at recent pretrial conferences before the Justice presiding in the Medical Malpractice Conference Part. The record reflects that at the last scheduled conference before the court on June 15, 2004 the court made a notation that a summary judgment motion would be made by

the defendant Flushing Hospital on or before June 23, 2004. Defendant's counsel further states that the topic of the summary judgment motion was first discussed with the court and plaintiff's counsel after efforts to obtain a voluntary Stipulation of Discontinuance proved futile. Based on the foregoing, the court grants defendant Flushing Hospital leave to move for summary judgment at this time.

It should be noted that plaintiff's sole opposition to this summary judgment motion is the fact that it was late and due to the untimeliness of the instant application it should not be considered by the court.

With reference to the merits of defendant movant's arguments, the court finds that Flushing Hospital has established its right to summary judgment as a matter of law (Zuckerman v. City of NY, 49 NY2d 557). Flushing Hospital argues, in the first instance, that it is entitled to summary judgment because the Hospital, cannot be held vicariously liable for the acts of the patient's private attending physician (Hill v. St. Clare's Hospital, 67 NY2d 72; Cook v. Reisner, 295 AD2d 466 (2d Dept. 2002)). It is undisputed that the plaintiff first presented to co-defendant Dr. Daniel Chi-Chow Kuo (Dr. Kuo)'s office in Flushing, NY on or about March 31, 1999 (See Dr. Kuo's deposition transcript p 22). Dr. Kuo performed a gynecological exam and noted that plaintiff suffered from myoma, a benign growth within the muscle layer of the uterus (Id p 23). Dr. Kuo noted that plaintiff had an irregular uterus with a large uterine myoma and advised the plaintiff of her surgical options including myomectomy or hysterectomy (Id pp 29-31). The plaintiff returned to Dr. Kuo on May 12, June 18, July 26, September 11 and October 11, 1999 during which time the plaintiff received Lupron injections in order to stop her menstruation so her iron levels due to anemia would increase and she would be prepared for surgery (Id pp 34-48). On the September 11, 1999 office visit Dr. Kuo explained the risks and benefits of myomectomy versus those of a total abdominal hysterectomy including the risk of ureteral injury (Id pp 43-45) and further informed her that it may become necessary to convert the procedure from a myomectomy to a hysterectomy depending on his findings on the day of the surgery (Id p 47).

On October 26, 1999 Dr. Kuo admitted the plaintiff to Flushing Hospital for a total abdominal hysterectomy and Dr. Kuo obtained the plaintiff's written informed consent on that date. Dr. Kuo performed the surgery on October 26, 1999 with two surgical resident assistants, Dr. Liu and Dr. Usafaly (Id p 69). Dr. Kuo as the primary surgeon was, according to his testimony "responsible for what happened" and would take "full responsibility" for the surgery and the patient (Id p 73 lines 12-18).

The plaintiff continued her treatment with Dr. Kuo after her surgery and returned to his office on November 1, 1999. Dr. Kuo examined her and found urine in her vagina. He gave her antibiotics and arranged for her to have an intravenous pyleogram

immediately (Id p 128). He arranged for her to have a consultation with a urologist, Dr. Granato, the next day (Id p 130). Dr. Kuo suspected she had a vascular necrosis of the uterer oversical junction which according to him was not a direct injury to the ureter, but "was the consequence of the procedure after one week, the vascular necrosis of the tissue (Id p 131). On December 27, 1999 plaintiff underwent an exploratory laparotomy, right ureteral re-implant with psoas hitch to repair a ureteral vaginal fistula at the University Hospital of Brooklyn. This surgery was performed by Dr. L. Hyacinthe.

Plaintiff alleges that Flushing Hospital departed from accepted standards of medical care from October 26, 1999 - October 30, 1999 by improperly performing a total abdominal hysterectomy which resulted in a ureterovaginal fistula necessitating surgical repair. It is well settled that a hospital will not be held liable for medical malpractice where the treatment is provided by the patient's own private attending physician (Hill v. St. Clare's, 67 NY2d 72; Cook v. Reisner, 295 AD2d 466 (2d Dept. 2002)). It is undisputed that Dr. Kuo was not an employee of Flushing Hospital (Kuo deposition transcript pp 19-20). Defendant Flushing Hospital also submits an affidavit from Dr. Steven J. Milim who reviewed the plaintiff's allegations and all of the relevant medical records and testimony in this case and opines within a reasonable degree of medical certainty that the care rendered to the plaintiff by the staff of Flushing Hospital was at all times in accordance with good and accepted medical practice.

The defendant Flushing Hospital similarly cannot be held liable for failing to obtain the patient's informed consent since Public Health Law §2805-d(1) specifically defines lack of informed consent as "[t]he failure of the person providing the professional treatment or diagnosis to disclosure to the patient such alternatives thereto..." Dr. Kuo was the person providing the medical treatment, not the hospital. The defendant Flushing Hospital did not order or perform the procedure (Domaradski v. Glen Cove, 242 AD2d 282 (2d Dept. 1997)).

Once the defendant establishes his prima facie entitlement to summary judgment, the plaintiff must submit competent proof in admissible form that independent acts or omissions of the hospital's own staff constitute departure from the standard of care and that said departures were the proximate cause of this plaintiff's injuries (Alvarez v. Prospect Hospital, 68 NY2d 322).

In accordance with the foregoing, the complaint and all cross claims are dismissed as against the defendant Flushing Hospital only.

Dated: August ,2004

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J.S.C.