SHORT FORM ORDER

INDEX No. 02-3697
CAL. No. 06-00269-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-27-06
ADJ. DATE 9-5-06
Mot. Seq. # 003 - MD

PATRICK J. ESPOSITO and DIANE M. ESPOSITO, Plaintiffs, - against - ERIC N. DUBROW, M.D., ORTHOPEDIC ASSOCIATES OF LONG ISLAND, LLP, and "KRISTEN/CHRISTEN DOE", a fictitious name intended to designate an employee, agent and/or servant of ERIC N. DUBROW, M.D. and/or ORTHOPEDIC ASSOCIATES OF LONG ISLAND, LLP, Defendants.	POISSON & HACKETT, ESQS. Attorneys for the Plaintiffs 1225 Franklin Avenue, Suite 475 Garden City, New York 11530 VARDARO & HELWIG, LLP Attorneys for Defendants Eric N. Dubrow, M.D., Orthopedic Associates and Kristen Sohl 732 Smithtown Bypass, Suite 203 Smithtown, New York 11787

Upon the following papers numbered 1 to 12 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10 - 11 ; Replying Affidavits and supporting papers 12 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order granting summary judgment in their favor is denied.

In July 1999, the plaintiff Patrick Esposito underwent surgery on his right elbow which was performed by the defendant Dr. Eric N. Dubrow. The defendant examined the plaintiff on August 9, 1999 and instructed him to be evaluated again in about six weeks. On September 1, 1999, the plaintiff was given a note signed by the defendant which provided that he was not to return to work until further notice and would be reevaluated on September 22, 1999. A couple of days later, however, the plaintiff claims that he received a telephone call from someone in the

defendant's office who told him to disregard the September 1st note and that he could return to work the following week. The plaintiff's file contains a copy of the note with a line through it and a handwritten notation that "patient should not have gotten this note". A second note in the file is dated September 2, 1999 and provides that the plaintiff may return to work on September 6th "within comfort tolerance". The plaintiff claims that he never saw the second note and, upon returning to work, was advised by his employer that he could work with no restrictions. A short time later the plaintiff, a mechanic, injured his elbow again and ultimately was required to undergo a second surgical procedure. The plaintiff then commenced this medical malpractice action alleging that the defendant was negligent in directing him to return to work earlier than medically appropriate. Following discovery, the defendants Dubrow, Orthopedic Associates of Long Island LLP and Kristen Sohl now move for summary judgment in their favor.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see,* ***Alvarez v Prospect Hospital***, 68 NY2d 320; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851).

Here, the defendants submit medical records, very limited pages from the defendants' depositions and an affirmation from Dr. Jay Wagner, who concludes that the care and treatment rendered to the plaintiff was within good and accepted medical practice. Dr. Wagner asserts that the September 2nd note, which allowed the plaintiff to return to work with restrictions six weeks after surgery, was medically appropriate. However, Dr. Wagner failed to address the fact that a note dated one day earlier advised the plaintiff not to return to work and to be evaluated September 22nd, which was consistent with the instructions following the August examination. In addition, Dr. Wagner did not address the plaintiff's allegations that he was never given the second note or advised about any limitation in his activities. Thus, the defendants have failed to make a prima facie showing of their entitlement to summary judgment. In any event, even if the defendants did make such a showing, the record demonstrates that triable issues of fact exist regarding the circumstances surrounding the two notes and whether the plaintiff was ever advised about limiting his activities upon his return to work (*see e.g.* ***Heller v Peekskill Community Hospital***, 198 AD2d 265 [2d Dept 1993]).

Accordingly, the motion is denied.

Dated: MAR 0 5 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**