At an I.A.S. Term, Part MMTRP, 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 27th day of March, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

----------X

RAMONA S. PANKEY,

Plaintiff,

DECISION & ORDER

-against-

Index No. 38734/04

LONG ISLAND COLLEGE HOSPITAL and THOMASENA LAROYA ELLISON, M.D.,

Cal. No. 2006-003475T

Defendants.

Motion Seq. Nos. 003, 004

----------X

The following papers numbered 1 to 10 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed	1 - 2
Notice of Cross-Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed	3 - 4
Affirmation(s) in Opposition and Exhibits Annexed	5, 7
Reply Affirmation(s)and Exhibits Annexed	6, 8
Supplemental Affirmation in Support	9
Reply to Supplemental Affirmation	10

[Motion Sequence Nos. 003 and 004 are consolidated for the purpose of disposition].

Upon the foregoing papers, and upon oral argument, plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment on the issue of liability. Defendant Thomasena La Roya Ellison, M.D. (Dr. Ellison) cross-moves pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint.

This is an action alleging medical malpractice, in which plaintiff claims that a surgical lap sponge was negligently left in her abdomen following a cesarean section performed on June 8, 2004 at Long Island College Hospital (LICH or the Hospital). The cesarean section was performed by defendant Dr. Ellison, a board certified obstetrician-gynecologist.

Plaintiff's Motion for Partial Summary Judgment

In support of her motion, plaintiff submits that affirmation of Vincent Ferragamo, M.D., a physician board certified in obstetrics and gynecology. In addition to being plaintiff's treating physician, Dr. Ferragamo has reviewed the medical records of the plaintiff, and states the following to a reasonable degree of medical certainty.

On June 8, 2004, plaintiff underwent a cesarean section performed by Dr. Ellison at defendant LICH. Dr. Ferragamo opines that these defendants departed from accepted standards of medical practice in failing to remove a surgical lap sponge from plaintiff's abdomen prior to completion of the cesarean section; in failing to accurately perform a post-operative surgical count of all surgical lap sponges used during the cesarean section; in failing to perform a thorough inspection of plaintiff's abdomen prior to completion of the cesarean section; and in failing to immediately diagnose that a foreign body was left in plaintiff's abdomen, despite plaintiff's continuing fever, vomiting, and complaints of nausea, abdominal distress, and extreme pain.

Dr. Ferragamo states that plaintiff's injuries were in no way caused by any action on her part, and that as a direct result of these departures, plaintiff sustained serious injuries, including pain and suffering both following labor and delivery as well as following subsequent exploratory laboratory performed to remove the surgical sponge; permanent scarring and disfigurement of plaintiff's abdomen ; small bowel obstruction; and post-operative wound infection.

The Cross-Motion by Dr. Ellison

Dr. Ellison opposes plaintiff's motion and cross-moves for summary judgment. While admitting that it is undisputed that a surgical lap pad remained in plaintiff's abdomen upon closure of the incision following the cesarean section, Dr. Ellison claims entitlement to summary judgment because she performed a thorough exploration of the abdominal cavity before beginning closure and appropriately relied upon assurances by the circulating nurse that the sponge count was correct.

In support, Dr. Ellison submits her own affirmation. While acknowledging no independent recollection of this surgery, Dr. Ellison states that it is the responsibility of the circulating nurse to ensure that the lap pad count is correct, and that it is accepted practice as well as Dr. Ellison's obligation to rely upon the count conducted by the circulating nurse. Dr. Ellison acknowledges that it is her custom and practice "to keep a running tally of the lap pads I use during surgery," and "to remove all clots and debris before beginning closure." She states that specifically mentioned clearing the "gutter" in her operative report because it is the only place in the abdominal cavity where she found anything that needed to be removed.

Also submitted is the affirmation of Dr. Ellison's medical expert, Monique DeFour Jones, M.D., board certified in obstetrics and gynecology. After review of the medical records and the deposition transcripts of Dr. Ellison and Jacqueline Simpson, R.N. (Nurse Simpson), Dr. Jones states the following to a reasonable degree of medical certainty:

Dr. Ellison performed a thorough exploration of the abdominal cavity prior to closure of the peritoneal cavity and was unable to detect a lap pad, after having been advised twice by the circulating nurse that the count of the lap pads (hereinafter the "sponge count") was correct. She was similarly advised prior to the closure of the skin. Dr. Jones opines that it was not a deviation for Dr.

Ellison to be unable to detect a lap pad in the peritoneal cavity following a thorough exploration, nor for Dr. Ellison to rely on the assurance of the circulating nurse that the sponge count was correct. Furthermore, it would be a deviation from the standards of medical practice for Dr. Ellison to NOT rely on the sponge count performed by the circulating nurse.

Despite carefully exploring the peritoneal cavity prior to closure, it is possible for a lap pad to remain undetected, especially in someone who is morbidly or extremely obese, as was the plaintiff. It is for this reason that the practice of sponge counts was instituted. In addition, a Pfannensteil incision, which was performed here, permits only a very limited visual exploration of the abdominal cavity, and the surgeon must rely on a manual exploration and the sponge counts of the circulating nurse prior to closure of the incision.

The protocol for counting lap pads during a cesarean section requires that the circulating nurse count every lap pad that has been discarded three times before final closure of the skin. Each count is checked against the total number of lap pads that were in the operating room at the start of the case and the number of lap pads that were given to the surgeon for use in the operative field. It is only the circulating nurse who knows the number of lap pads that remain in the operative field. If the circulating nurse states that the count is not correct, the surgeon will re-explore the cavity. If no lap pad is found and the count is still not correct, an X-ray of the abdominal cavity will be taken to identify its location. The lap pad will then be removed, and the peritoneum closed.

Dr. Jones states that even when the surgeon is alerted to the fact that the count is not correct and that a lap pad remains in the abdomen, it may not be found during a re-exploration even more meticulously performed than the first. It is more common for this to occur in extremely obese patients. The failure to find the lap pad on re-exploration is not a deviation from the standards of

medical practice.

The standards of medical practice require that if for some reason the surgeon does not obtain an x-ray when the sponge count is not correct, the operating room staff has the obligation and the authority to order the x-ray. According to standards of medical practice, the surgeon relies on the sponge count of the circulating nurse both when advised that the count is correct and when advised that the count is incorrect. When the counts are properly performed, it is not possible for a lap pad to remain in the patient.

Dr. Jones opines that the failure of the circulating nurse to keep an accurate sponge count deprived Dr. Ellison of the opportunity to order an x-ray in the operating room, and that the miscount by the circulating nurse was the proximate cause of plaintiff's injuries. Dr. Jones further opines that following the exploration of the abdominal cavity, there was no reason for Dr. Ellison to consider the possibility that a lap pad remained in the patient's abdomen based on the circulating nurse's assurance three separate times that the sponge count was correct.

Addressing next the issue of a delay in diagnosis, Dr. Jones finds that there was no delay attributable to Dr. Ellison. Plaintiff's morbid obesity was a complicating factor in surgery, making both the actual performance of the surgery more difficult as well as the postoperative recovery. Abdominal surgery results in a normal physiological postoperative ileus, an alteration in the motility of the intestinal tract. Plaintiff's symptom of abdominal pain following the surgery was consistent with postoperative surgical pain, for which plaintiff was initially medicated with opioids that delay the return of gastric motility. Plaintiff's postoperative symptoms of abdominal pain, abdominal distension and nausea were consistent with postoperative ileus, for which there is no specific treatment.

While plaintiff did develop a temperature within twenty-four hours of surgery, Dr. Jones opines that there was no deviation by Dr. Ellison in her treatment of the plaintiff, especially given the correct sponge counts. Fever above 38°C (100.4°F) is common in the first few days after major surgery, occurring in approximately 40% of patients. Most early postoperative fever is caused by the inflammatory stimulus of surgery and resolves spontaneously. If a physical examination provides no support for a diagnosis of infection, the appropriate treatment is to increase fluid intake and observe the patient.

Dr. Ellison ordered an abdominal x-ray to ascertain the position of a nasogastric tube. The Hospital personnel did not follow her order for an abdominal x-ray, but instead performed a chest x-ray. Had Dr. Ellison's order been followed, the retained lap pad would have been diagnosed on the patient's first postoperative day. Dr. Jones opines that the failure by the Hospital to perform the abdominal x-ray as ordered was a deviation from the standards of medical practice, and the result was a delay in the diagnosis of a retained lap pad.

The abdominal x-ray that Dr. Ellison had ordered was ultimately performed one day later. When she was advised that the x-ray indicated that in addition to an ileus there was evidence of an obstruction and a foreign body in the abdomen, Dr. Ellison saw plaintiff and advised her that surgery was necessary. The surgery was performed and the foreign body was removed.

Dr. Jones concludes that the treatment provided by Dr. Ellison was not a proximate cause or substantial contributing factor in the outcome of the injuries allegedly sustained by the plaintiff.

Opposition by LICH to the Motion and Cross-Motion

In opposition to plaintiff's motion, LICH submits an affidavit by Nurse Simpson, who has been employed as a registered nurse at LICH from 1989 to the present, and employed as a registered

nurse in the Department of Labor and Delivery as an obstetrical nurse since 1996. Nurse Simpson has read the medical record of the plaintiff from LICH and states that she is fully familiar with the facts and circumstances of her involvement in plaintiff's care as an obstetrical nurse on June 8, 2004.

While a patient is in the operating room, Nurse Simpson's duties include working with the surgical team to ensure the patient's safety, to ensure that all instruments are ready and available for the operating physicians and performing the surgical count, which includes counting the instruments, laparotomy pads and sponges used during surgery. Specifically with regard to carrying out a surgical count, her responsibility is to participate in the surgical counts along with the scrub tech and to document these counts each time one is performed. The verification of the count is then documented by Nurse Simpson in the "Labor and Delivery Operating Room Log Tally Sheet" (hereinafter "tally sheet"), which is included in the patients's hospital chart.

It is custom and practice for obstetrical nurses to work with the surgical team with regard to the process of counting instruments, laparotomy sponges, pads and other materials introduced into the operative field, and to perform four surgical counts in a cesarean section delivery, to be performed by the obstetrical nurse and the scrub nurse. The first count is done before the surgical incision is made; the second count is done at the close of the uterus; the third at the close of the fascia; and the fourth at the close of the skin.

In the plaintiff's case there were a total of four surgical counts. A copy of the June 8, 2004 tally sheet notes that there were 30 laparotomy pads counted prior to the commencement of the operation, 30 laparotomy pads counted at the close of the uterus, 30 laparotomy pads counted at the close of the fascia and 30 laparotomy pads counted after the close of the skin. As such, the tally sheet documents that the laparotomy pads prior to the commencement of the surgery were all

accounted for after the conclusion of the procedure and all counts were consistent and correct. Nurse Simpson thus opines that there was no departure or deviation from standard practice in obstetrical surgical count by the obstetrical nursing staff with regard to the plaintiff.

The Opposition of LICH to the Cross-Motion

The cross-motion of Dr. Ellison is opposed by LICH, which states succinctly through its counsel that clear issues of fact exist when considering the expert affidavits of Dr. Ferragamo and Dr. Jones, and the Affidavits of Dr. Ellison and Nurse Simpson.

Analysis

The Timeliness of the Motion

Plaintiff's motion for partial summary judgment is dated May 10, 2006 and was served by mail on May 12, 2006. This is 94 days after the filing of the note of issue on February 7, 2006. The cross-motion for summary judgment is dated October 2, 2006 and was served by mail on October 3, 2006. This is 237 days after the filing of the note of issue.

Pursuant to CPLR 3212 (a), a party "may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made." Part 13 of the Uniform Rules of the Civil Term, Supreme Court, Second Judicial District, Kings County, provides that motions for summary judgment shall be made within sixty days of the filing of the note of issue. Courts may only entertain an untimely summary judgment motion when the movant demonstrates "good cause" for his or her delay, which the Court of Appeals has deemed to entail "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]), " rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, id., at 652). Stated

otherwise, "[w]hether there is merit to the late motion for summary judgment is not a relevant consideration" (*Czernicki v Lawniczak*, 25 AD3d 581 [2006]).

In addressing the issue of timeliness, plaintiff's counsel attributes the delay to difficulty in contacting Dr. Ferragamo in order to secure his medical opinion, since he was in the process of retiring and was not keeping regular office hours, and due to the time Dr. Ferragamo required to review plaintiff's medical records. Plaintiff does not point to, and the court is not aware of, any case which recognizes this as good cause.

The plaintiff charts the course of her case, and made this motion when she elected to do so, rather than in response to a motion by a defendant. As the Court of Appeals noted in *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects [Habiterra Assoc.]* (5 NY3d 514, 521[2005]): "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated (*see Miceli v State Farm Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Kihl v Pfeffer*, 94 NY2d 118 [1999])." Plaintiff's motion was made more than 60 days after she filed the note of issue, in violation of Rule 13, and the plaintiff has failed to establish good cause for the delay (*see* CPLR 3212[a]; *Giordano v. CSC Holdings, Inc.*, 29 AD3d 948 [2006]; *Bevilacqua v City of New York,* 21 AD3d 340 [2005]; *First Union Auto Fin. v Donat,* 16 AD3d 372 [2005]).

Similarly, the cross-motion by the defendant Dr. Ellison is late, having been filed 237 days after the note of issue and some 143 days after the plaintiff's motion. Dr. Ellison has failed to articulate a sufficient reason why this motion could not have been made within the required time limit.

Were the court to consider the merits of the motion and cross-motion, the cross-motion by Dr. Ellison would be denied and the motion by the plaintiff would be granted to the following extent.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact (*Colely v Michelin Tire Corp.*, 99 AD2d 795 [1984]). A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the court in directing judgment in favor of any party as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). Upon a showing by the movant of entitlement to judgment as a matter of law, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). When the court is considering competing arguments in a summary judgment motion, "the opponent is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties" (*Marshall v Vilar*, 303 AD2d 466, 466 [2003]).

"To establish a prima facie case of liability in a medical malpractice action, the plaintiff must prove that the defendant physician deviated or departed from good and accepted standards of medical practice, and that the departure was the proximate cause of injury or damage" (*Roseingrave v Massapequa General Hospital*, 298 AD2d 377, 379 [2002]). In order to sustain this burden, the plaintiff "must present expert opinion testimony that the defendant's conduct constituted a deviation from the requisite standard of care" (*Pace v Jakus*, 291 AD2d 436, 436-437 [2002]; *see also Perrone v Grover*, 272 AD2d 312 [2000]). Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When that occurs, a credibility question is presented requiring a jury's resolution (*Feinberg v Feit,* 23 AD3d 517

[2005]; *Shields v Baktidy*, 11 AD3d 671, 672 [2004]).

Here, the court finds that the opinions proffered by the respective experts as well as the affidavits of Dr. Ellison and Nurse Simpson establish issues of fact as to whether the defendants deviated from accepted standards of medical practice in their care of the plaintiff, and whether these deviations led to the claimed injuries. The existence of these factual issues precludes the granting of summary judgment to Dr. Ellison.

While it is undisputed that a surgical lap pad was left in the plaintiff following the cesarean section, necessitating its surgical removal at a later date, questions of fact have been raised as to who was responsible for ascertaining the presence of same in the plaintiff prior to closure of the skin. Dr. Ellison in her affirmation acknowledged that it is her custom and practice "to keep a running tally of the lap pads I use during surgery" and "to remove all clots and debris before beginning closure," and indicated that she specifically mentioned clearing the "gutter" in her operative report because it is the only place in the abdominal cavity where she found anything that needed to be removed." Dr. Ellison additionally stated that it is the responsibility of the circulating nurse to ensure that the lap pad count is correct and that Dr. Ellison is entitled to rely upon that count. Juxtaposed against these statements are the statements of Nurse Simpson that 30 lap pads were counted at four discrete intervals, and that all 30 were accounted for.

It is an undisputed fact that one lap pad was left inside the plaintiff's abdomen, and it was left there through the actions of either or both defendants. The question of fact which precludes the granting of summary judgment exists because it is yet to be determined whether the lap pad was left inside the plaintiff's abdomen through the actions of one or both of the defendants.

Plaintiff would have been entitled to partial summary judgment on the issue of liability had

her motion been timely. Defendants are claiming no actions of the part of the plaintiff which contributed to the appearance of the lap pad in her abdomen, yet it is a departure for a surgical lap pad to remain in a patient after the surgical site is closed, thereby incurring pain, infection, subsequent surgery, and so forth (see, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 496-497 [1997]). What remains to be determined is the responsibility of either or both of the defendants in committing that departure. Therefore, had plaintiff's motion been timely, she would have been entitled to summary judgment on liability, but would have been precluded from entering that judgment until the finder of fact had determined the respective responsibility of each of the defendants.

One issue remains to be addressed. Plaintiff, in seeking partial summary judgment, alternatively claimed that summary judgment should be granted on the basis of the doctrine of res ipsa loquitur. While the Court of Appeals has discussed that doctrine in a similar case where a laparotomy pad was left in a patient (*Kambat v St. Francis Hosp.*, 89 NY2d 489, supra), the Court of Appeals has also held that summary judgment based upon res ipsa loquitur need not be granted where the "circumstantial evidence allows but does not require the jury to infer that the defendant was negligent" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Such is the case here as there are questions of fact whether the responsibility for leaving the pad in the plaintiff rests with Dr. Ellison, the Hospital, or a combination of the two.

Conclusion

Accordingly, the motion by the plaintiff for partial summary judgment on the issue of liability, and the cross-motion for summary judgment by Dr. Ellison, are each denied as untimely.

This constitutes the decision and order of the court.

ENTER,

HON. GERARD H. ROSENBERG
J. S. C.