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 24th day of September, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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SHIRLEY DINERMAN, as Executrix of the Estate of IRVING P. DINERMAN, and SHIRLEY DINERMAN, Individually,

Plaintiff,

DECISION & ORDER

-against-

Index No. 32378/03

Cal. No. 2006-017763T

MAIMONIDES MEDICAL CENTER, SHEEPSHEAD NURSING AND REHABILITATION CENTER, LLC, a/k/a SHEEPSHEAD NURSING HOME, et al.,

Motion Seq. Nos. 004, 005

Defendants.

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The following papers numbered 1 to 6 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed	1 - 2, 3 - 4
Affirmation(s) in Opposition and Exhibits Annexed	5
Reply Affirmation(s)and Exhibits Annexed	6

Upon the foregoing papers, defendant Sheepshead Nursing and Rehabilitation Center, LLC (Shhepshead) moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint (Motion Sequence No. 004). Defendant Benzion Sacolick, M.D. (Dr. Sacolick) moves for similar relief on proximate cause grounds (Motion Sequence No.

005). These motions are consolidated for disposition.

Background

This is a medical malpractice action, in which it is alleged, inter alia, that Sheepshead failed to maintain Irving Dinerman (decedent) on his proton pump inhibitor medication and provide proper medication; improperly changed decedent's medication; failed to properly monitor and treat decedent's peptic ulcer disease and gastrointestinal condition; failed to monitor, diagnose and treat decedent's gastrointestinal bleeding, anemia and hematocrit[1]; and failed to obtain decedent's informed consent concerning the discontinuance of the proton pump inhibitor. Plaintiff's allegations against Dr. Sacolick include in part that Dr. Sacolick failed to maintain the decedent's proton pump inhibitor medication to treat peptic ulcer; and failed to monitor decedent's anemia and hematocrit levels, which ultimately caused his death after being transferred to co-defendant Maimonides Medical Center (Maimonides) on September 11, 2001.

The 79-year old decedent had originally been admitted to Mt. Sinai Medical Center on July 9, 2001 to receive treatment for aspiration pneumonia, which he contracted after undergoing an endoscopy for previously diagnosed peptic ulcer disease (PUD). During the Mt. Sinai admission decedent was started on a proton pump inhibitor (PPI), rabeprazole, also known as Acephex, as a gastrointestinal prophylaxis. After 16 days decedent was transferred to Sheepshead on July 27, 2001, where he was examined by Dr. Sacolick, who was on staff at Sheepshead. Dr. Sacolick has testified that he is independent of and not an employee of

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[1] Percentage of the volume of a blood sample occupied by cells (Stedman's Medical Dictionary, 28th Ed.).

Sheepshead, and billed decedent's health insurer directly for the care and treatment provided. He has also testified that he made treatment decisions for the decedent without speaking with anyone at Sheepshead, except when he requested a consultation.

On August 28, 2001 Dr. Sacolick switched decedent's medication from Aciphex to Zantac. Dr. Sacolick has testified that the decedent had made complaints of being over medicated and that the medications were making the decedent sluggish mentally and he was still not feeling 100%. Decedent had also advised Dr. Sacolick that since arriving at Sheepshead he had no stomach problems.

Between August 28, 2001 and September 11, 2001 the decedent made no complaints of stomach problems. Then on September 11, 2001 decedent complained of heartburn, a burning sensation, for which Dr. Sacolick prescribed Maalox. At 6:10 p.m. the decedent, who was heard calling for assistance, was found sitting on the floor beside the bathroom floor, and stated that he felt dizzy coming from the bathroom. He denied losing consciousness or hitting his head and was assisted to his bed. At 8:20 p.m. decedent complained of nausea, abdominal pain and slight shortness of breath. He was perspiring, cold and clammy, and pale. After administration of oxygen decedent indicated that he felt better. At 9:10 he complained of dizziness and was still pale with cold and clammy skin. The Sheepshead staff called for an ambulance and notified Dr. Sacolick, who ordered decedent's transfer to Maimonides to rule out gastrointestinal (GI) bleeding.

At this point the events of September 11. 2001 become relevant to this story. In the first instance, there was a delay of approximately 40 minutes in locating an ambulance because of

the attacks on the World Trade Center buildings. Secondly, the Maimonides records contain an entry dated September 12, 2001 indicting that the decedent informed a physician at Maimonides that his stomach started to feel uneasy after he heard about the terrorist attacks and that "within an hour [he] had symptoms of dizziness and fell."

Decedent arrived at the Maimonides ER at 10:10 p.m. on September 11, 2001. On September 12, 2001 decedent's stool tested positive for blood, and he underwent two endoscopies - on September 12, 2001 and September 13, 2001. The September 12 endoscopy was negative for active bleeding, but indicated that decedent had had some bleeding within the last 24 hours. Dr. Scott Tenner, a co-defendant who performed this endoscopy, testified that he observed a superficial coating of blood and erosions, which he suspected to be "merely some oozing from erosive gastritis." Nevertheless, Dr. Tenner considered decedent to be at high risk of re-bleed. During the September 13, 2001 endoscopy co-defendant Dr. Kadirawel Iswara noted old dried blood and a Kaposi's sarcoma[2] nodule in the stomach, but no active bleeding.

The Maimonides chart indicates that the decedent died on September 15, 2001 of cardiopulmonary failure secondary to cardiopulmonary arrest. At the request of the family no autopsy was conducted.

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[2] This was not a new diagnosis. At the time of decedent's transfer to Sheepshead on July 27, 2001 he had a prior medical history for peptic ulcer disease, Kaposi's sarcoma, diabetes, Parkinson's disease, recurrent duodenal ulcer, asbestos exposure, an enlarged prostate, peripheral vascular disease, coronary arterial disease, and hypertension and ideopathic hypertrophic subaortic stenosis (a congenital heart condition).

DISCUSSION

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

The essential elements of a medical malpractice claim are a departure from good and accepted medical practice and evidence that such departure was a proximate cause of the plaintiff's injury (*see DiMitri v Monsouri*, 302 AD2d 420, 421 [2003]). Therefore, on a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In support of its motion defendant Sheepshead submits the affirmation of Louis Mudannayake, M.D. (Dr. Mudannayake), board certified in Internal Medicine and Geriatrics, who after review of the medical records, Verified Bills of Particulars and other pleadings, and

the deposition testimony, opines with a reasonable degree of medical certainty that the care and treatment provided to the decedent was proper in all respects and well within the accepted standards of good medical practice.

Dr. Mudannayake opines that the decedent, throughout his admission at Sheepshead, was noted to be alert, well-oriented, able to make his needs known, and of independent decision-making ability. Indeed, review of the Sheepshead chart and deposition transcripts indicates that he remained that way throughout the admission, and he was an active, demanding, and vocal participant in this own care. Dr. Mudannayake opines that the Sheepshead staff took a proper history, and that on July 27, 2001, the decedent was thoroughly evaluated by co-defendant Dr. Sacolick, who took Mr. Dinerman's medical history and performed a physical examination. Dr. Sacolick arranged for Mr. Dinerman to receive the medications prescribed at Mt. Sinai Medical Center, including the proton pump inhibitor (PPI) rabeprazole (Aciphex) for PUD.

On August 28, 2001, Dr. Sacolick switched Mr. Dinerman from Aciphex to Zantac 150 mg after a discussion with the patient. As noted above, Mr. Dinerman complained that he felt over-medicated and was not experiencing PUD symptoms. Dr. Mudannayake opines that Mr. Dinerman was a competent adult capable of discussing his medical care with his physicians and participating in making treatment decisions, and that both Aciphex and Zantac serve the same purpose, to decrease the secretion of stomach acid. Therefore, since Dr. Sacolick considered all relevant and important factors prior to switching the medications, including the fact that he might have to switch Mr. Dinerman back to Aciphex, the medication change ordered by Dr.

Sacolick on August 28, 2001 was well within the applicable standard of care.

Dr. Mudannayake further opines that on September 11, 2001, Sheepshead staff properly responded to Mr. Dinerman's symptoms, by appropriately and promptly notifying Dr. Sacolick of Mr. Dinerman's complaints of stomach burn for which Dr. Sacolick prescribed Maalox. They also appropriately and promptly notified Dr. Sacolick of Mr. Dinerman's fall, and properly monitored Mr. Dinerman and followed Dr. Sacolick's orders for follow-up care and transfer to Maimonides. In fact, given that the foregoing events occurred on the day of the World Trade Center disaster when most of the City's emergency services were diverted to Ground Zero, Dr. Mudannayake states that the timeliness of Mr. Dinerman's transfer to Maimonides was commendable. Dr. Mudannayake also states that it was not the hospital staff's responsibility to obtain informed consent for any of the treatment, including prescriptions of medication, since this was the responsibility of the decedent's private attending physician.

Dr. Mudannayake observes that although decedent's red blood cell count, hemoglobin, and hematocrit were low during the Sheepshead admission and on September 11, 2001, those values are not indicative of acute GI bleeding. If anything, this indicates that Mr. Dinerman had chronic anemia, and that he suffered an acute event after observing the World Trade Center attacks that required a higher level of care than could have been provided at Sheepshead, and Mr. Dinerman was appropriately transferred to Maimonides to receive that care.

It is Dr. Mudannayake's opinion that there is additional evidence on the record that Mr. Dinerman was not actively bleeding at the time of his transfer from Sheepshead to Maimonides. Mr. Dinerman had a guaiac test in the Emergency Department which was negative for blood.

During the Maimonides admission, he underwent two endoscopies, both of which found no evidence of active GI bleeding or of a recurrent duodenal ulcer or gastric ulcer. Finally, the Maimonides chart indicates that Mr. Dinerman died of cardiopulmonary failure secondary to cardiopulmonary arrest, not of a GI bleed.

Dr. Mudannayake opines that Sheepshead staff provided proper care and treatment for Mr. Dinerman. There is no indication that any of the treatment provided by physicians at Sheepshead was contraindicated and should have been questioned by the Sheepshead staff. Both Aciphex and Zantac serve the same purpose, so Mr. Dinerman was not left without medication. In fact, Sheepshead staff provided Mr. Dinerman with proper and sufficient medical care and there was no indication that he required surgical care, or additional diagnostic testing and x-rays. Even if surgery or additional testing was required, Sheepshead is a nursing home and cannot provide those services. That is why the staff promptly transferred Mr. Dinerman to Maimonides.

In addition, Dr. Mudannayake states that the records maintained by Sheepshead for Mr. Dinerman were proper and adequate. Properly noted in Mr. Dinerman's chart were the multiple medical conditions from which he suffered, including PUD, GI bleeding in the past, and aspiration pneumonia just prior to his arrival at Sheepshead. Mr. Dinerman had an endoscopy on September 13, 2001 indicating erosive gastritis. This condition was not among Mr. Dinerman's admitting diagnoses to Sheepshead and could have developed during the admission. However, it is not the standard of care at a nursing home to test or treat a resident for a condition of which there are no signs or symptoms, or knowledge.

Dr. Mudannayake opines that even if Mr. Dinerman had suffered acute gastritis on September 11, 2001 while at Sheepshead, this was a sudden acute event triggered by the World Trade Center attacks, and this event could not have been prevented by Aciphex or Zantac. Mr. Dinerman told the Sheepshead staff that his symptoms started after he observed the terrorist attacks on television. To a reasonable degree of medical certainty, such stress can increase acid production even if a patient is medicated. Further, in light of Mr. Dinerman's symptoms, Sheepshead's staff acted appropriately by having him promptly transferred to Maimonides. There was nothing else that could be done at Sheepshead, including endoscopies and surgery, if necessary, to follow up on Mr. Dinerman's symptoms.

Lastly, Dr. Mudannayake opines that Mr. Dinerman did not die of a GI bleed, that the care and treatment provided to Mr. Dinerman at Sheepshead was appropriate in all respects and well within the applicable standard of care, and that Sheepshead's treatment did not cause Mr. Dinerman's alleged injuries.

In support of his motion, Dr. Sacolick relies upon the affirmation of Sheepshead's expert Dr. Mudannayake, as well as the deposition testimony of Dr. Sacolick.

In opposition to the defendants' motions plaintiff submits the redacted affirmation of a physician who is a board-certified medical examiner and surgeon, with added qualifications in surgical critical care. This expert opines that: "Succinctly stated, the change in medication by Sheepshead and Dr. Sacolick on August 28, 2001 from a Proton Pump Inhibitor to an H2blocker was a departure from standard practice of medicine and was more likely than not the substantial cause of Mr. Dinerman's recurrent gastrointestinal bleeding that resulted in his

terminal admission to Maimonides Medical Center, and the medical difficulties he experienced at Maimonides leading to his death."

Plaintiff's expert notes that Mr. Dinerman was at Mount Sinai Medical Center for GI bleeding and pneumonia. The peptic ulcer disease was treated with proton pump inhibitors. He had been previously diagnosed with Kaposi's sarcoma of the left leg, which was treated with radiation and chemotherapy. Plaintiff's expert opines that after his transfer to Sheepshead, Dr. Sacolick and Sheepshead changed Mr. Dinerman's medication on August 28, 2001 utterly without medical justification. Proton Pump Inhibitors are more effective than H2 blockers for increasing the gastric pH and preventing recurrent gastrointestinal bleeding. Nothing in the Sheepshead medical chart or other medical records herein demonstrated any clinical support for this change in medication. Rather, the change of PPI medications to H2 blocking agents was more likely than not the substantial cause of the recurrent gastrointestinal bleeding that ultimately resulted in the aforementioned terminal admission of Mr. Dinerman to Maimonides.

Plaintiff's expert notes that Dr. Sacolick in his deposition does not give any reason for the change in medication that is supported by any fact or circumstance reflected in the actual medical chart. The Sheepshead record is devoid of any symptoms or circumstances that warranted taking Mr. Dinerman off of a PPI, which had been quite effective in the management of his peptic ulcer disease and the prevention of a GI bleed. Plaintiff's expert opines that, similarly, the affirmation of Dr. Mudannayake does not provide any medical explanation for the change in this critical medication that is supported by any fact, circumstance, or observation that is reflected in the Sheepshead record or any other medical records.

Plaintiff's expert notes that on September 11, 2001 Mr. Dinerman was transferred to Maimonides Medical Center for further GI bleeding and anemia. The admission hematocrit was 23%. Lansoprazole (Prevacid) was started, packed red blood cells (2 units) were transferred, and a surgical consult was obtained. Upper GI endoscopy was remarkable for gastric erosions and blood in the stomach. The decedent was transferred to the medical intensive care unit. The plan was to keep with hematocrit above 30% with packed red blood cell transfusions as needed. Mr. Dinerman had persistent tachycardia, and the hematocrit remained low (25.5%). He developed hypotension on September 30, 2001. By that time he had been transfused 5 units of packed red blood cells, and he continued to have evidence of active upper GI bleeding (melena, hypotension and low hematocrit). On September 14, 2001, Mr. Dinerman was found unresponsive and in respiratory arrest. He was intubated, given a fluid challenge and a nasogastric tube was placed. He was transfused to a hematocrit of 35.7%. In all, 11 units of packed red blood cells was transfused. Cardiac enzymes were remarkable of myocardial infarction. On September 15, 2001, Mr. Dinerman had another episode of marked hypotension, and sinus baradycardia. A DNR order was entered. He expired that day.

Conclusion

Here, upon the properly supported papers of both sides (*Marano v Mercy Hospital,* 241 AD2d 48 [1998]), the court finds that issues of fact exist which preclude the granting of summary judgment. These medical issues are set forth in the affirmations of the parties' respective experts, and include the change in PPI medication, the significance of the findings as observed in the endoscopies of September 12 and 13, 2001, and informed consent. Plaintiff's

expert has opined that the defendants departed from accepted standards of medical practice and that such departures were a substantial factor in causing the decedent's injuries and death. The opinions offered by plaintiff's expert are not "[m]ere conclusory statements, expressions of hope, or unsubstantiated allegations [which are] insufficient to defeat the motion" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, supra), and when considered against defendants' expert's narratives and findings of an absence of departures and proximate cause, issues of fact have been raised which require resolution by a jury. The conflicting opinions of medical experts present a credibility question requiring a jury's resolution, and summary judgment may not be awarded (*Graham v Mitchell,* 37 AD3d 408, 409 [2007]).

In addition, the decedent was assigned Dr. Sacolick as his physician at Sheepshead, thereby making Sheepshead vicariously liable (*Mduba v Benedictine Hosp.*, 52 AD2d 450 [1976]). However, that portion of defendant Sheepshead's motions for summary judgment on the issues of negligent hiring, retention and training is granted, as plaintiff has failed to oppose or even address this part of the motion.

Conclusion

Accordingly, defendants' motions are granted only on the issue of negligent hiring, retention and training, and are otherwise denied.

This constitutes the decision and order of the court.

ENTER,

HON. GERARD H. ROSENBERG

J. S. C.