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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey PART 40 D
Justice

NICHOLAS DAVY and MADELYNN HEINTZ,

Plaintiffs,

Index No.: 112266/05
MOTION SEQ. NO. 2
MOTION CAL. NO.

-v-

MARK SCHIFFER, PAUL ROMANELLO, DONNA INGRAM, PARK EAST CARDIOLOGY ASSOCIATES, P.C., BUSHRA MINA, BUSHRA MINA PULMONARY AND CRITICAL CARE PHYSICIAN, P.C., RALPH FINGER, KATHERINE VAKHER, KAREN FRIED, KRISTINE BYRNE and LENOX HILL HOSPITAL,

Defendants.

The following papers, 1 - 52, were read on this motion by defendants Paul Romanello, Karen Fried and Lenox Hill Hospital for summary judgment dismissing the complaint as asserted against them, or in the alternative, seeking,along with defendants Mark Schiffer, Donna Ingram and Park East Cardiology Associates, P.C., to preclude plaintiffs' expert from testifying on the ground that their expert witness response, served pursuant to CPLR §3101(d), was inadequate; and cross-motion by defendants Bushra Mina, Bushra Mina Pulmonary and Critical Care Physician, P.C. to preclude plaintiffs' expert from testifying on the ground that their expert witness response, served pursuant to CPLR §3101(d), was inadequate

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1-44
Notice of Cross-Motion - Affidavits	45-46
Answering Affidavit -	47-50
Replying Affidavit - Exhibit	52

Cross-Motion: ■ Yes ❑ No

Plaintiffs commenced the instant medical malpractice action against the defendants, alleging that defendants were negligent in failing to discuss a spiculated nodule finding on a CT scan, or the need for it to be monitored, with the plaintiffs. According to plaintiffs, as a result of defendants' negligence, the nodule was not discovered until approximately two years later. The

nodule grew over that two year period and was found to be malignant upon surgical excision.

On March 4, 2003, injured plaintiff, Nicholas Davy, presented to the emergency room at Lenox Hill Hospital with shortness of breath, chest tightness, and nausea. It was suspected that he had a pulmonary embolism and he was admitted into the hospital. A CT Scan was performed on March 5, 2003. The CT scan revealed a pulmonary embolism, as well as the presence of a spiculated nodule in Mr. Davy's upper right lobe. A CT scan report was prepared, noting all findings, including the presence of the spiculated nodule. The report recommended a follow-up CT scan in three months to "ensure stability." Following the diagnosis of a pulmonary embolism, Mr. Davy was transferred to the pulmonary unit at Lenox Hill Hospital for treatment. Mr. Davy was ultimately discharged from Lenox Hill Hospital on March 14, 2003. At no time during his hospitalization was Mr. Davy or his wife, Madelynn Heintz, informed of the finding of a spiculated nodule on the CT scan, or the need for it to be monitored. As set forth above, the nodule was not discovered until approximately two years later, during which time it grew in size. The nodule was found to be malignant upon surgical excision.

Discovery has been completed in this action, the Note of Issue/Certificate of Readiness has been filed and this case is now ready for trial. Defendant Dr. Paul Romanello presently moves for summary judgment dismissing the complaint as asserted against him[1], or in the alternative, seeks, along with defendants Dr. Mark Schiffer, Dr. Donna Ingram and Park East Cardiology Associates, P.C., to preclude plaintiffs' expert from testifying on the ground that their expert witness response, served pursuant to CPLR §3101(d),was inadequate. Defendants Dr. Bushra Mina and Bushra Mina Pulmonary and Critical Care Physician, P.C. have cross-moved to preclude plaintiffs' expert from testifying on the ground that their expert witness response, served pursuant to CPLR §3101(d), was inadequate.

Defendant Dr. Romanello seeks summary judgment pursuant to CPLR §3212, dismissing plaintiffs' complaint as asserted against him. "[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "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 demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, prima facie, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, supra; Winegrad v. New York Univ. Med. Center, supra. Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to

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[1] Defendants Karen Fried and Lenox Hill Hospital similarly moved for summary judgment dismissing the complaint as asserted against them, however, plaintiff has agreed to discontinue the action as against these defendants. Therefore, that portion of the instant motion seeking summary judgment on behalf of Karen Fried and Lenox Hill Hospital has been rendered moot.

produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra.

Dr. Romanello seeks summary judgment with respect to those claims relating to his alleged negligent medical treatment of the injured plaintiff, arguing that the medical treatment that he provided to Mr. Davy during his admission to Lenox Hill Hospital in March of 2003 was within good and accepted standards of medical practice. In support of this motion, Dr. Romanello relies upon, among other things, an affidavit in which he states that he saw Mr. Davy on one occasion during his hospitalization, on March 10, 2003, in the capacity of a covering physician for the injured plaintiff's admitting physician, defendant Dr. Schiffer. At that time, the injured plaintiff was being treated with Coumadin for his primary diagnosis of pulmonary embolism, and Dr. Romanello was responsible for checking the laboratory tests performed that day in connection with this treatment. According to Dr. Romanello, the standard of care did not require that he discuss with the plaintiffs an incidental finding on the March 5, 2003 CT scan report of a spiculated nodule in the upper lobe of the right lung, nor the need for a follow up, with respect to that finding. According to Dr. Romanello, he has no recollection of whether the CT scan report of March 5, 2003, which was issued by radiologist Dr. Karen Fried, was in the medical chart on the day he treated injured plaintiff, but even if it was, the standard of accepted medical care would not have required him, as a covering physician, to discuss the "secondary and incidental" findings addressed in the report.

The aforementioned affidavit of Dr. Romanello is sufficient to make a prima facie showing of entitlement to judgment as a matter of law, demonstrating the absence of any material issues of fact with respect to the adequacy of the medical treatment he provided to injured plaintiff. See Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998];see also Alvarez v. Prospect Hospital, supra. The burden, therefore, shifts to plaintiffs to come forward with evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra. It appears that plaintiffs argue in opposition to Dr. Romanello's motion for summary judgment, that Dr. Romanello was aware of the March 5, 2003 CT scan report when he treated the injured plaintiff on March 10, 2003, but failed to discuss the findings of that report with him. However, plaintiffs have not submitted the affidavit of a medical expert setting forth that a failure on the part of Dr. Romanello was a deviation from the standards of good and accepted medical treatment. Therefore, plaintiffs have not come forward with evidentiary proof in admissible form sufficient to establish the existence of material issues of fact as to whether Dr. Romanello was negligent in the manner in which he provided medical treatment to injured plaintiff during his admission to Lenox Hill Hospital in March of 2003.

Plaintiffs further argue that even if this Court were to find that no material issues of fact exist with respect to the adequacy of the medical treatment provided by Dr. Romanello, summary judgment must be denied because he may still be found vicariously liable for the negligent actions of his partners, i.e., Dr. Schiffer and Dr. Ingram, and the partnership, i.e., Park East Cardiology Associates, P.C. According to plaintiff, a copy of the March 5, 2003 CT scan report, which included a finding of a spiculated nodule, and recommended a follow-up CT scan in three months was faxed to the Park East Cardiology Associates, P.C. on March 5, 2003. Therefore, plaintiffs contend, the partnership, which consisted of Dr. Romanello, Dr. Schiffer and Dr. Ingram, was aware that Mr. Davy had a suspicious mass on his lung that required follow-up, but never discussed same with Mr. Davy or his wife.

The Court acknowledges that a partner may be held vicariously liable for negligent acts of another partner undertaken in the furtherance of the partnership. See Hardter v. Semel, 197 AD2d 846 [4th Dept. 1993]; Fenelli v. Adler, 131 AD2d 631 [2d Dept. 1987]. However, Dr. Romanello, Dr. Schiffer and Dr. Ingram were not partners, but shareholders in a professional service corporation, formed pursuant to Article 15 of the Business Corporation Law.[2] As such, one cannot be held vicariously liable for the negligence of the other. See Paciello v. Patel, 83 AD2d 73 [2d Dept. 1981]; see also Hill v. St. Clare's Hospital, 67 NY2d 72[1986][merely because a physician is a shareholder, officer or employee of a professional service corporation does not make him vicariously liable for the malpractice of another doctor who is an officer, director and employee of the corporation]. Moreover, a shareholder of a professional corporation will not be liable for the obligation of that corporation, unless such shareholder was a participant in the tortious conduct, or if such conduct occurred under his supervision. See Connell v. Hayden, 83 AD2d 30 [2d Dept. 1981]; see also Somer v. Wand, 219 AD2d 340 [2d 1996]. Similarly, a director, officer or agent of a professional corporation will only be liable for the torts of that corporation, or other officers or agents, where he or she participated in, authorized or directed the tortious conduct. See Connell v. Hayden, supra. As there is no evidence that Dr. Romanello participated in the alleged tortious conduct, as addressed above, or in any way authorized or directed such conduct, he may not be vicariously liable for the negligent actions of Dr. Schiffer, Dr. Ingram, or Park East Cardiology Associates, P.C. Accordingly, Dr. Romanello's motion for summary judgment dismissing the complaint as asserted against him is granted.

With respect to that portion of the motion, and cross-motion seeking to preclude plaintiffs' expert from testifying, plaintiffs are directed to provide defendants with the dates of their expert's medical school attendance, as well as the dates of the expert's licensure. Although movants and cross-movants argue that the expert witness disclosure is overly broad, vague and prejudicial in that it does not set forth the anticipated testimony with respect to each individual defendant, the alleged departures in this case are identical to all defendants, i.e., failing to discuss a spiculated nodule finding on a CT scan and the need for it to be monitored. Therefore, the Court finds this aspect of the expert disclosure to be adequate.

Based upon the foregoing, it is hereby

ORDERED that defendant Paul Romanello, motion for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that that portion of the motion and cross-motion seeking to preclude plaintiffs' expert is granted only to the extent that plaintiffs are directed to provide defendants with the dates of their expert's medical school attendance, as well as the dates of the expert's licensure; and it is further

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[2] It appears that throughout the course of discovery Dr. Romanello, Dr. Schiffer and Dr. Ingram referred to one another as "partners" in Park East Cardiology Associates, P.C. Notwithstanding, it is clear that Park East Cardiology Associates, P.C. is a professional corporation, as evidenced by the certificate of incorporation annexed to Dr. Romanello's reply papers, and these physicians are shareholder's of the corporation, as set forth in the Shareholder Agreement, which also was annexed to Dr. Romanello's reply papers.

ORDERED that counsel for all parties are to appear before the court on June 4, 2008, at 9:30am, at 100 Centre Street, Room 1306, Part 40D, for jury selection.

Dated: 05/29/2008

J.S.C.

Check one: ❑ FINAL DISPOSITION ■ NON- FINAL DISPOSITION

Check if appropriate: ❑ DO NOT POST ❑ REFERENCE