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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

DELIA PHEBE,

Plaintiff,

- against -

NASSAU HEALTHCARE CORPORATION and NASSAU UNIVERSITY MEDICAL CENTER,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 15320/05

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendants move for an order pursuant to CPLR 3212 (a) (b) (e) granting summary judgment in their favor, and dismissing the underlying personal injury action. The plaintiff opposes the motion. The defense replies to the plaintiff's opposition. The underlying action arises from the plaintiff's claim the plaintiff underwent a colonoscopy procedure on September 23, 2004, which resulted in a sigmoid colon perforation requiring an exploratory laparotomy with a sigmoid resection, as well as a side to side functional end to end anastomosis. The plaintiff was hospitalized at Nassau University Medical Center from September 23, 2004 through October 1, 2004. The plaintiff was admitted on February 21, 2006, to North Shore University for a left paraumbilical hernia repair. This Court has

carefully reviewed all of the papers submitted with respect to this motion.

The then 70 year old plaintiff was referred by Elmont Community Healthcare Center for screening colonoscopy in 2004 based upon the plaintiff's age. The plaintiff, a native of Haiti, claims never having had a colonoscopy, and neither speaking, understanding nor able to speak English, so all conversations or writings between healthcare providers and the plaintiff took place in the presence of the plaintiff's children, who translate those conversations and writings in Creole.

Dr. James Sullivan, M.D., a board certified colorectal surgeon, states, in an affirmation dated August 1, 2008, in support of the defense motion, to a reasonable degree of medical certainty, despite the occurrence of a perforated colon, all of the care rendered in the performance of the colonoscopy, the timely diagnosis of the perforated tear and the performance of the repair were all within the then existing accepted standards of good medical practice. Dr. Sullivan opines a reasonable in the plaintiff's position being told of the low risk of perforation occurring and the benefit of detecting early cancer would have consented to the colonoscopy procedure examination. Dr. Sullivan maintains any subsequent complaints and complications by the plaintiff, such as a hernia which occurred 16 months after the plaintiff's discharge was known and accepted complications from the plaintiff's laparotomy repair at Nassau University Medical Center.

The defense attorney states, in an affirmation dated August 21, 2008, there are no triable issues of fact, and the plaintiff has improperly alleged punitive damages as a cause of action. The defense attorney contends the plaintiff has failed to show any evidence of conduct by the defendants which could be considered gross recklessness, intentional, wanton,

malicious or activated by evil or reprehensible motives. The defense attorney submits an affidavit dated August 21, 2008, by Dr. Steven Yang, M.D., and the November 9, 2007 testimony by Nurse Beverly Griffith regarding the custom and practice, as well as the interpretation, to wit discussing the risks, benefits and alternatives to the colonoscopy screening.

The plaintiff states, in an opposing affidavit dated October 8, 2008, through an interpreter, Therese Kleinman, in an affidavit dated October 8, 2008, only speaking Creole, and being unable to read or write Creole or English. The plaintiff explains, in detail, the circumstances which gave rise to the underlying personal injury action. The plaintiff's son, Wagner Phebe, reiterates, in an opposing affidavit dated October 8, 2008, the contentions of the plaintiff with respect to the circumstances which gave rise to the underlying personal injury action.

The plaintiff's attorney states, in an opposing affirmation dated September 12, 2008, not going to go over the factual incident where the plaintiff was a patient at the defendant hospital, rather relies on the plaintiff's January 10, 2007 deposition testimony, and other documents. The plaintiff's attorney also points to statements made in the procedural history of M. David Klein, M.D., in the doctor's affirmation in support of a motion to dismiss, and the plaintiff's deposition testimony on February 9, 2005, and states the evidence shows all of the conversations between the doctors and the plaintiff's children were never translated to the plaintiff in Creole. The plaintiff's attorney takes issue with the statements by Dr. Sullivan, Dr. Yang and Nurse Griffith referred to by the plaintiff. The plaintiff's attorney contends the plaintiff did not received the information which would suggest the plaintiff gave informed

consent for the treatment, and knew the alternatives and risks. The plaintiff's attorney points out Dr. Tomas Pattugalan, M.D., in an affidavit dated October 10, 2008, clearly indicates informed consent should have been give to the plaintiff about the colonoscopy. Dr. Pattugalan opines, with reasonable medical certainty, the failure to properly inform the plaintiff about the nature and extent of the colonoscopy, the risks, benefits and alternatives was not consistent with good and accepted medical practice. Dr. Pattugalan states the plaintiff should have been given the opportunity to be informed in Creole or in some other manner as to the nature and extent of the colonoscopy, and the risks in order to give the plaintiff choice as to whether the plaintiff wished to go through the procedures. Dr. Pattugalan states, with reasonable medical certainty, the care and treatment rendered to the plaintiff by the defendants was not consistent with good and accepted medical practice, and they did not properly inform the plaintiff nor provide adequate information as to the consequences and the risks with respect to the colonoscopy, and further negligence and carelessness by the hospital staff causing a left paraumbilical hernia and which later required repair.

The defense attorney states, in a reply affirmation dated October 31, 2008, the plaintiff fails to raise a triable issue of fact in opposition to the motion. The defense attorney points out the claim for punitive damages, according to written preliminary conference agreement dated January 6, 2006, was to be withdrawn by plaintiff's counsel, but it is unclear if the plaintiff effectively withdrew that claim. The defense attorney also contends the plaintiff has not presented any evidence to show the defendants' conduct was grossly reckless, intentional, wanton or malicious as aimed at the public or activated by evil or

reprehensible motives. The defense attorney reiterates the defense has established, through their medical expert, their entitlement to summary judgment. The defense attorney challenges the defense expert with respect to silence on the plaintiff's claim the defendants deviated from any accepted medical care in the performance of the colonoscopy. The defense attorney points out the defense expert agrees with the plaintiff's expert, to wit that a perforation which occurred is a known risk of the colonoscopy which can occur without departures from accepted medical practice. The defense attorney notes Dr. Pattugalan's affidavit is premised on the argument solely related to informed consent and whether the plaintiff should have gone through with the colonoscopy had the plaintiff been informed of the apparent risks of the colonoscopy, and fails to rebut the defense contentions. The defense attorney asserts Dr. Pattugalan's opinion is brief, and in a conclusory and vague manner. The defense attorney avers the plaintiff's entire opposition focuses on informed consent, however the plaintiff has failed to create an issue of fact or rebut the defense proof that the cause of action for informed consent must be dismissed with prejudice. The defense attorney argues the plaintiff gave informed consent, and points to the plaintiff's testimony in support of that contention.

Under CPLR 3212 (b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party ... [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded

only when it is clear that no triable issue of fact exists (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 325; ***Andre v Pomeroy***, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelan v GTE Sylvania***, 182 AD2d 446). Here, in view of the applicable legal standards, plaintiffs' causes of action can be sustained. The complaint must not be dismissed. The court's role is issue finding rather than issue determination (***see, e.g., Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395; ***Gervasio v Di Napoli***, 134 AD2d 235, 236; ***Assing v United Rubber Supply Co.***, 126 AD2d 590). Nevertheless, " 'the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated' " (***Gervasio v Di Napoli, supra***, 134 AD2d, at 236, quoting ***Assing v United Rubber Supply Co., supra; see, Columbus Trust Co. v Campolo***, 110 AD2d 616, ***affd*** 66 NY2d 701). If the issue claimed to exist is not genuine and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v Pomeroy***, 35 NY2d, ***supra***, at 364; ***Assing v United Rubber Supply Co., supra***). Here, the plaintiffs have not demonstrated that, on the facts, any of them is entitled to judgment as a matter of law under CPLR 3212 (b).

Here, the defendants have demonstrated that, on the facts, they are entitled to judgment as a matter of law under CPLR 3212 (b). In opposition, the plaintiff presents a triable issue of fact with respect to the claims of medical malpractice and informed consent which requires resolution by the trier of fact, but the plaintiff does not present a triable issue

of fact with respect to the claim of punitive damages which would require resolution by the trier of fact.

Accordingly, the defense motion is granted only to the extent of granting summary judgment on the claim of punitive damages, and denied with respect to the claims of medical malpractice and informed consent.

So ordered.

Dated: **January 7, 2009**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX