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

PRESENT: Honorable Joan B. Carey Justice

PART 29

LINDA PRYOR,

INDEX NO. 109896/06

Motion Sequence No.: 2-3

Plaintiff,

-v-

NEW YORK PRESBYTERIAN HOSPITAL/ WEILL CORNELL MEDICAL CENTER, MICHAEL NISSEN, M.D., MICHAEL NISSEN, M.D., P.C., CHARLES J. DOERING, M.D., LIEBERT S. TURNER, M.D., MARY DIVER, CRNA, KAY CYNAMON, M.D., LENOX HILL COMMUNITY MEDICAL GROUP, JANE DOE 1-10 and JOHN DOE MEDICAL FACILITY/ CORPORATION 1-10 (names being fictitious as presently unknown, intended to be the individual(s) and/or entities providing medical examination, clearance, and treatment to plaintiff in January of 2004 and February 2004 in connection with the right eye vitrectomy performed on February 3, 2004),

Defendants.

The following papers, 1- 60, were read on this motion by defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., for summary judgment dismissing the complaint; and separate motion by defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group for summary judgment dismissing the complaint.

Motion Sequence Number 2:	Papers Numbered
Notice of Motion - Affidavits - Exhibits - Memo of Law	1-23
Affirmation In Opposition - Affidavits - Exhibits	24-39
Replying Affirmation - Exhibits	40

Motion Sequence Number 3:	Papers Numbered
Notice of Motion - Affidavits - Exhibits - Memo of Law	41-58
Affirmation in Opposition - Affidavits - Exhibits	(24-39)
Replying Affirmation - Exhibits	59-60

Cross-Motion: ☐ Yes ■ No

Plaintiff, Linda Pryor, presented to Dr. Nissen on January 9, 2009, with poor vision in her right eye.[1] At the time plaintiff was a 51 year old woman, who was morbidly obese (330 lbs, and 5' 6"), and whose medical history included hypertension, diabetes, chronic renal insufficiency and hyperlipidemia. Dr. Michael Nissen recommended that plaintiff undergo a pars plana virectomy with membrane peeling in the right eye to address tractional retinal detachment and proliferative diabetic retinopathy in that eye. Plaintiff's surgical history included a pars plana virectomy in May of 2003, to treat a similar condition in her left, and a right eye cataract surgery in November of 2003.

On January 14, 2004, plaintiff presented to Lenox Hill Medical Group to obtain pre-operative medical clearance for the upcoming eye surgery. Dr. Raghu Kunamneni, a second year resident, took plaintiff's history and a review of systems. Dr. Raghu Kunamneni also performed a physical examination, and ordered pre-operative studies, including a chest x-ray, electrocardiogram and blood tests. Dr. Kunamneni discussed plaintiff's case with his supervisor attending physician, Dr. Lucas Elijovich, who also evaluated the plaintiff. Plaintiff was asked to return on January 16, 2004, to review all her test results and perform medical clearance. Plaintiff returned to Lenox Hill Medical Group on January 16, 2004. Dr. Kunamneni again performed a history and a physical examination, and it appears that during Dr. Kunamneni's discussion with plaintiff during this visit, she informed him that she experienced dyspnea on exertion. With respect to the plaintiff's chest x-ray, her lungs were clear, however, a prominent left ventricle and aortic arch were noted, as was some thoracic spodylosis. Plaintiff's blood tests revealed elevated glucose, which was consistent with her diabetes, elevated creatinine levels, and elevated blood urea nitrogen, which was associated with her renal insufficiency. Plaintiff's hemoglobin and hematocrit counts were abnormally low, which was also associated with her renal insufficiency. The electrocardiogram performed on January 14, 2004, was stable when compared to the electrocardiogram of November 5, 2003. Notwithstanding, the tracing of the electrocardiogram indicated "possible anteroseptal infarct - age undetermined." Dr. Kunamneni discussed the plaintiff's case with Dr. Kay Cynamon, an attending physician, who then also questioned, evaluated and examined plaintiff. Dr. Cynamon noted on plaintiff's medical clearance, plaintiff's history with respect to her diabetes, hypertension, hyperlipidemia, chronic renal insufficiency , obesity, dyspnea on exertion, as well as eye pain and changes in vision. Dr. Cynamon faxed the medical clearance to Dr. Nissen, which was received and reviewed by Dr. Nissen.

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[1] It is noted that although plaintiff presented with complaints about the vision in her right eye during this visit, it appears that the vision in that eye was still better than the vision in her left eye.

Dr. Nissen was to perform the pars plana virectomy with membrane peeling in the right eye on January 20, 2004, however, because the doctor was ill, the surgery was postponed until February 3, 2004. However, prior to the performance of the surgery, plaintiff again presented to Lenox Hill Medical Group. Plaintiff's medical clearance for the upcoming surgery was not addressed during this visit. Plaintiff's pars plana virectomy with membrane peeling in the right eye was ultimately performed on February 3, 2004. The surgery was performed at New York Presbyterian/Weill Cornell Medical Center and the anesthesia was administered by Dr. Liebert S. Turner, the anesthesiologist, and Mary Diver, CRNA, the nurse anesthetist, who were employed by New York Presbyterian/Weill Cornell Medical Center. The surgery was done under a monitored anesthesia plan, as opposed to general anesthesia. During the surgery, plaintiff made complaints about a burning sensation in her chest and having trouble breathing, and sat up partially. Dr. Nissen advised the plaintiff to lay back down, informing her that he needed more time to complete the procedure.[2] After lying back down, plaintiff's discomfort and breathing difficulties worsened. Plaintiff again sat up, this time sitting up completely, causing the infusion cannula that was positioned in her eye during the surgery to break. At that moment, plaintiff suffered respiratory failure. It appears that a code was called, as several people came into the operating room to stabilize the plaintiff.

Once plaintiff was stabilized, Dr. Nissen closed the openings in the eye, applied antibiotic ointment, *i.e.*, bacitracin, and patched and shielded the eye. The surgery was not completed. Plaintiff was then admitted to the intensive care unit. On February 9, 2004, approximately six (6) days after the surgery, Dr. Nissen observed endophthalmitis, an infection of the eye, in plaintiff's right eye.[3] A surgical endovitreal tap and antibiotic injection were done immediately. Prior to February 9, 2004, Dr. Nissen did not administer any medication to plaintiff to prevent endophthalmitis. As a result of the endophthalmitis, plaintiff has no vision in her right eye.

Plaintiff commenced the instant medical malpractice action against above captioned defendants with the filing of a summons and complaint on or about July 17, 2006. Plaintiff alleges, *inter alia*, that she received improper medical clearance for the February 3, 2004 surgery, and that she received inappropriate anesthesia care during the subject operation.[4] Plaintiff further alleges in her complaint that she received negligent care and treatment of her eye following the intra-operative complication. Plaintiff alleges that as a result of such negligence she suffered from endophthalmitis in her eye, causing a total loss of vision. Plaintiff's complaint also contains a cause of action for lack of informed consent.

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[2] Dr. Nissen testified at his deposition that he was told by the anesthesiology team that plaintiff's oxygen saturation level was normal and that she was okay to continue. Notwithstanding, plaintiff testified that she did not hear the anesthesiologist say anything in the operating room at that time

[3] It is noted that prior to February 9, 2004, plaintiff had not been seen by Dr. Nissen since February 6, 2004. However, it is also noted that on February 6, 2004, tests were performed to rule out infection, and no infection was found.

[4] In plaintiff's bills of particulars she alleges that the anesthesia care she received was contraindicated because she suffered from Pickwicklan Syndrome, which is obesity hypoventilation syndrome.

Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., presently move for summary judgment dismissing the complaint as asserted against them. By separate motion, defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group seek summary judgment dismissing the complaint as asserted against them. It is noted that Dr. Liebert S. Turner, the anesthesiologist, Mary Diver, CRNA, the nurse anesthetist, and New York Presbyterian/Weill Cornell Medical Center, the facility at which the subject surgery was performed, are no longer parties to this action pursuant to settlement.

Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., presently move for summary judgment dismissing the complaint as asserted against them. By separate motion, defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group seek summary judgment dismissing the complaint as asserted against them. "[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 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.

Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C.

Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., presently move for summary judgment dismissing the complaint as asserted against them arguing that Dr. Nissen did not depart from the standard of care in connection with his treatment of plaintiff, that he did not cause plaintiff's injuries, and that he appropriately secured the informed consent of plaintiff prior to the performance of the subject procedure. Dr. Nissen contends that plaintiff was cleared for the surgery by Dr. Cynamon and Lenox Hill Community Medical Group, and that Dr. Nissen appropriately relied on such medical clearance. Dr. Nissen also contends that Dr. Turner and CRNA Diver were wholly responsible for the administration of anesthesia during the plaintiff's surgery. Dr. Nissen also contends that he obtained adequate informed consent from plaintiff prior to the performance of the subject surgery.

Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., rely upon, *inter alia*, the expert affidavit of a physician who is board certified in ophthalmology. Dr. Nissen's ophthalmology expert opines that the care provided to plaintiff by Dr. Nissen was within the standard of care. The expert states that plaintiff "was suffering from severe diabetic retinopathy of the right eye which appropriately necessitated a right eye pars plana vitrectomy with membrane peeling which Dr. Nissen performed." With respect to pre-operative medical clearance, Dr. Nissen's ophthalmology expert sets forth that this was performed by plaintiff's outside primary care physicians, Dr. Cynamon and Lenox Hill Community Medical Group, and Dr. Nissen appropriately relied upon this outside surgical clearance in making the determination to go

forward with the plaintiff's surgery. The expert states that it was proper to defer the decision as to whether the plaintiff could tolerate anesthesia during the performance of the surgery to the clearing physicians, as well as the anesthesiologist at New York Presbyterian/Weill Cornell Medical Center, Dr. Turner. The expert further states that "there were no medical conditions present that warranted DR. NISSEN to override the medical clearance given." Dr. Nissen's ophthalmology expert also sets forth in his affidavit that the screening for Pickwickian Syndrome is the responsibility of the clearing physician, as opposed to the operating surgeon, and adds that based upon the evidence herein, plaintiff was never diagnosed with Pickwickian Syndrome.

With respect to the administration of anesthesia during the surgery of February 3, 2004, Dr. Nissen's ophthalmology expert sets forth that Dr. Nissen properly relied upon the anesthesiology team for pre-operative anesthesia and surgical monitoring of plaintiff, and there were no medical conditions present that warranted him to override the decision of the anesthesiology team to implement the anesthesia care of their choosing. The expert states that Dr. Nissen, as an ophthalmologist, appropriately deferred to the expertise of the anesthesiologist in choosing the plaintiff's anesthesia care. In this expert's opinion, Dr. Nissen's care of plaintiff in connection with the performance of the surgery of February 3, 2004 was proper, and did not cause plaintiff's injuries.

Dr. Nissen's ophthalmology expert further opines that Dr. Nissen did not depart from good and accepted ophthalmological care with respect to the care and treatment of plaintiff post-operatively. The expert expressly sets forth that Dr. Nissen "properly administered antibiotic ointment to the plaintiff's eye during completion of the surgery on February 3, 2004 thereby controlling for the possible development of endophthalmitis." According to this expert, Dr. Nissen's care of plaintiff following the surgery of February 3, 2004 was proper, and did not cause plaintiff's injuries, including the development of endophthalmitis, a known risk of the surgery.

With respect to plaintiff's informed consent cause of action, Dr. Nissen's ophthalmology expert opines that Dr. Nissen appropriately secured informed consent of the plaintiff prior to the performance of the subject surgery. The expert further states that a reasonable person in the position of the plaintiff herein would agree to undergo the procedure in an effort to prevent blindness, despite the known risks involved, including the possibility of infection and total loss of vision.

Defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., in support of their motion, also submit the expert affidavit of a physician who is board certified in anesthesiology.[5]

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[5] Plaintiff contends that the Court should not consider the affidavit of the anesthesiology expert of defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C., arguing that since this action was settled against Dr. Turner, the anesthesiologist, Mary Diver, CRNA, the nurse anesthetist, and New York Presbyterian/Weill Cornell Medical Center, the hospital that provided the anesthesiology, issues relating to anesthesiology no longer remain in the case. The Court disagrees. The relationship between the operating surgeon, and the defendants that administered plaintiff's anesthesia is highly relevant in this case. Dr. Nissen should not be precluded from offering expert opinion relating to anesthesia care simply because this action has been settled as against the anesthesiology defendants.

Similar to the opinions set forth by Dr. Nissen's ophthalmology expert, the anesthesiology expert opines that Dr. Nissen properly relied upon the anesthesiology team for pre-operative anesthesia and surgical monitoring of plaintiff, and there were no medical conditions present that warranted him to override the decision of the anesthesiology team to implement the anesthesia care of their choosing. Dr. Nissen's anesthesiology expert sets forth that ophthalmologic surgeries are often performed under monitored anesthesia care unless a patient's medical clearance providers specifically instruct otherwise, or a patient advises the surgeon that they can not lie still for the procedure. According to this expert, after a discussion with plaintiff herein, Dr. Nissen determined that she would be able to lie still for the procedure.This expert also notes that both prior to and subsequent to the subject surgery, plaintiff was administered monitored anesthesia care during surgical procedures without complication. Dr. Nissen's anesthesiology expert ultimately concludes that Dr. Nissen did not depart from good and accepted practice in connection with plaintiff's anesthesiological care during the surgery of February 3, 2004, and did not cause any injury to plaintiff.

In opposition to defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C.'s motion, plaintiff submitted, *inter alia*, the expert affidavit of a physician, who is board certified in ophthalmology, as well as surgery. The expert opines that Dr. Nissen departed from good and accepted medical care "in negligently evaluating this morbidly obese diabetic asthmatic woman with a history of kidney failure and heart disease for retinal surgery." The expert sets forth that "Dr. Nissen is responsible for the surgery and overseeing that which occurs during his surgery and in his operating room including but not limited to the issues concerning medical clearance and the type of sedation given to this patient who is asthmatic, hypertensive, diabetic, had heart disease and had complained of earlier chest pain and dyspnea on exertion." This expert also sets forth that Dr. Nissen did not adequately communicate to the internists the fact that the performance of the subject surgery required plaintiff to be lying supine on her back for many hours.

Plaintiff's ophthalmological expert further opines that Dr. Nissen departed from accepted ophthamological and surgical care in allowing the infusion cannula to break while in plaintiff's eye during the surgical procedure. According to this expert, Dr. Nissen should have been aware that plaintiff was not medically stable to proceed with this surgery after sitting up partially while being operated on, and after making complaints of warmness in her chest. The expert sets forth that Dr. Nissen should have removed all instrumentation and closed up plaintiff's eye to finish the procedure, on another day. It is stated in the expert affidavit that Dr. Nissen's failure to timely remove the cannula from plaintiff's eye resulted in the breaking of the cannula in the eye and dramatically increased the risk of endophthalmitis. The expert further states that plaintiff was put in even greater risk of endophthalmitis when the medical staff came into the operating room for resuscitation, compromising the sterility of the room. In this expert's opinion, a failure to recognize, treat and/or prevent plaintiff's surgical complications in a timely manner led to plaintiff's endophthalmitis.

Additionally, plaintiff's ophthalmological expert opines that following plaintiff's surgical complications, Dr. Nissen did not treat plaintiff's eye in an aggressive manner to prevent the development of endophthalmitis. The expert states in his affidavit that Dr. Nissen applied a mild antibiotic ointment and a shield to plaintiff's eye after the surgical complications arose. However, according to this expert, "this was not an adequate prophylactic treatment for endophthalmitis considering that the eye had been open for an extended period of time, many people had been in the operating room, and it is impossible to maintain a sterile field during a

code." Plaintiff's ophthamology expert states that it is standard to cover a patient with multiple antibiotics whenever there is a contamination of the field or when a foreign object remains in the body, but plaintiff herein was not treated with the needed antibiotics. The expert further sets forth that Dr. Nissen did not treat plaintiff with the needed antibiotics until five or six days following the plaintiff's surgery, only after the signs of endophthalmitis were present. According to this expert, "[h]ad Dr. Nissen removed the cannula and closed the eye in a timely fashion and/or used adequate antibiotic prophylaxis for endophthalmitis, then it is [his] reasonable and professional opinion that [plaintiff's] eye may have been saved and she would have functional vision."

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether Dr. Nissen departed from accepted ophthamological and surgical care in allowing the infusion cannula to break while in plaintiff's eye during the surgical procedure. Contrary to the position taken by Dr. Nissen's expert, plaintiff's expert opines that immediately after plaintiff sat up for the first time and began making complaints of warmness in her chest, Dr. Nissen should have removed the instrumentation and closed plaintiff's eye to finish the procedure on another day, thereby avoiding the injury to plaintiff's eye. Issues of fact and credibility also exist in connection with whether Dr. Nissen departed from accepted ophthamological and surgical care in the manner in which he prophylactically treated the plaintiff's eye to prevent endophthalmitis, following the subject surgery. These issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]).

With respect to plaintiff's informed consent cause of action, Dr. Nissen's ophthalmology expert offered nothing more than a conclusory opinion, simply stating that Dr. Nissen appropriately secured informed consent of the plaintiff prior to the performance of the subject surgery. Such a conclusory affidavit does not sufficiently establish, *prima facie*, defendants' entitlement to judgment as a matter of law. See Grant v. Hudson Valley Hospital Center, 55 AD3d 874 [2d Dept. 2008]; Perre v. Vassar Brothers Hospital, 52 AD3d 670 [2d Dept. 2008]. Accordingly, defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C.'s motion for summary judgment is also denied with respect to plaintiff's cause of action for lack of informed consent.

Defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group

By separate motion, defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group seek summary judgment dismissing the complaint as asserted against them. These defendants argue that their treatment of plaintiff was in complete accordance with the good and accepted medical standards of care. In support of their motion, defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group rely upon, *inter alia*, the expert affidavit of a physician who is board certified in internal medicine. Defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group's expert opines that the actions of these defendants in clearing the plaintiff for the subject surgery were entirely proper. According to this expert, a proper and complete medical evaluation, examination and workup was conducted, and did not reveal any contraindications for the plaintiff to undergo eye surgery. The expert states that from a general medical standpoint, eye surgery is a low risk procedure, and, thus, elaborate cardiopulmonary evaluations are rarely needed in performing preoperative evaluations for such procedures. The expert adds that the plaintiff had undergone an uneventful vitrectomy in May of 2003, as well as cataract surgery in November of 2003, with no respiratory or cardiac distress or complications.

Defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group's internal medicine expert states that despite plaintiff's obesity, plaintiff never exhibited signs of Pickwickian syndrome, and, therefore, there was no reason to suspect this condition. The expert adds that even subsequent to the subject surgery, plaintiff has never been diagnosed with Pickwickian syndrome. The expert further states in the affidavit that "[t]here is no evidence to suggest that plaintiff experienced dyspnea at rest, orthopnea, paroxysmal nocturnal dyspnea, or any difficulty breathing while laying supine throughout the night." Then the expert states that a pulmonary function testing was not required as part of the plaintiff's preoperative medical evaluation, and again stressed that the surgery to be performed was a low risk procedure, and that plaintiff had recently undergone two uneventful eye surgeries. The expert further sets forth that since the electrocardiogram performed on January 14, 2004 was stable when compared to the electrocardiogram of November 5, 2003, which was conducted immediately prior to plaintiff's uneventful surgery of November of 2003, there was no requirement to perform further cardiac evaluations.

Thereafter, the expert states that the results of the preoperative medical clearance examination were timely faxed and received by Dr. Nissen, to be used by him and the anesthesiologist in deciding what anesthesia and precautions needed to be used for plaintiff's surgery. The expert then discusses the role of an internist that examines a patient for preoperative medical clearance, which is to assess a patient's overall status, to identify peri-operative issues, and to report these findings to the surgeon. The internist must apprise the surgeon of underlying medical conditions of a patient that may have an impact on the surgery, or findings which contraindicate the surgery. According to this expert, "Kay Cynamon, M.D. and Lenox Hill Community Medical Group followed good and accepted medical standards of care with respect to their preoperative evaluation of plaintiff." Thereafter, the expert sets forth that all decisions relating to the surgery and the type of anesthesia to be used are to be made by the surgeon and the anesthesiologist, and where a patient's medical condition deteriorates immediately prior to the surgery, it is the responsibility of the surgeon and the anesthesiologist to fully evaluate the present condition of the patient to determine whether to proceed. The expert adds that the surgeon and the anesthesiologist should consider communicating with the internist if they believe there has been a change in a patients medical condition subsequent to the time preoperative medical clearance was given.

In conclusion, defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group's internal medicine expert opines that these defendants "fully complied with the accepted standard of care by their performance of a proper and complete medical evaluation on the plaintiff and by their timely notification to the surgeon of their comprehensive findings." The expert further opines that these defendants did not cause injury to plaintiff by any act or omission on their part.

In opposition to defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group's motion for summary judgment, plaintiff submits, *inter alia*, the expert affidavit of a physician who is a Diplomate of the National Board of Medical Examiners and the American Board of Internal Medicine. This expert opines that Dr. Cynamon and Lenox Hill Community Medical Group departed from accepted standards of medical practice in failing to report to the operating surgeon various precautions that needed to be taken in operating on plaintiff. According to plaintiff's internal medicine expert, plaintiff was morbidly obese and had an alarmingly high body mass index. The expert states that as a result of plaintiff's size, her abdominal girth would place excessive pressure on her diaphragm while in the supine position and inhibit respiration. The expert further states that precautions should have been taken to avoid allowing such pressure to be placed on plaintiff's diaphragm because the effect it may have on her respiration may

become critical when there is the simultaneous administration of a sedative, such as anesthesia, which also suppresses respiration. Therefore, in the opinion of this expert, Dr. Cynamon and/or Lenox Hill Community Medical Group should have cautioned Dr. Nissen about putting the plaintiff in the supine position during the performance of her surgery, and informed Dr. Nissen that plaintiff should be placed in a semi-recumbent position during such surgery. The expert further opines that a failure to do so was a significant factor in causing injury to plaintiff, as plaintiff's intra-operative respiratory failure was induced by improper positioning.

Additionally, plaintiff's internal medicine expert states that during plaintiff's preoperative medical clearance consultation, plaintiff complained of dyspnea upon exertion; tests conducted indicated that plaintiff had a prominent left ventricle and aortic arch, as well as elevated creatinine; plaintiff's hemoglobin and hematocrit counts were abnormally low; and the tracing of the electrocardiogram indicated "possible anteroseptal infarct." The expert further states that medical clearance was given by Dr. Cynamon and/or Lenox Hill Community Medical Group without knowledge of the length of the subject procedure; the position which plaintiff would be lying/sitting during the procedure, what form of anesthesia would be used, whether she slept on more than one pillow and whether she snored. According to the expert, based upon the medical findings at the time of plaintiff's evaluation, as well as the plaintiff's obesity, it was a departure on the part of Dr. Cynamon and/or Lenox Hill Community Medical Group to provide clearance for the subject surgery without knowledge of the aforementioned information. It is the experts opinion that Dr. Cynamon and/or Lenox Hill Community Medical Group failed to perform an appropriate assessment, which resulted in injury to plaintiff.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether Dr. Cynamon and/or Lenox Hill Community Medical Group departed from good and accepted medical practice in failing to inform Dr. Nissen that plaintiff should be placed in a semi-recumbent position during the subject surgery, as well as issues with respect to the adequacy of the assessment performed by these defendants. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]).

Based on the foregoing, it is hereby

ORDERED that defendants Michael Nissen, M.D. and Michael Nissen, M.D., P.C.'s motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that defendants Kay Cynamon, M.D. and Lenox Hill Community Medical Group's motion for summary judgment dismissing the complaint is denied and it is further

ORDERED that counsel for all parties are to appear before the court on July 2, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 4/15/2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON- FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE