SCAN

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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SHARON E. GLICKSMAN and STEVEN GLICKSMAN,

Plaintiff(s),

Index No. 11770/07

Motion Submitted: 5/29/09
Motion Sequence: 001

-against-

STUART IRA ROSENZWEIG, M.C., RICHARD FEDERBUSH, M.D., RICHARD FEDERBUSH, M.D., P.C., NORTH SHORE UNIVERSITY HOSPITAL AT SYOSSET and NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

This motion by Richard Federbush, M.D. and Richard Federbush, M.D., P.C. ("Dr. Federbush"), for an order pursuant to CPLR § 3212 granting him summary judgment dismissing the complaint against him is denied.

In this medical malpractice action, the plaintiffs seek to recover damages for the defendants' failure to diagnose Sharon Glicksman's pneumonoccal sepsis when she was

treated in the emergency room at North Shore University at Syosset on January 13, 2006. The defendant Dr. Federbush seeks summary judgment dismissing the complaint against him on the grounds that he never treated Ms. Glicksman, and even if he participated in her treatment, he was not responsible for her care or discharge.

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent 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." ***(Sheppard-Mobley v. King***, 10 A.D.3d 70, 74, 778 N.Y.S.2d 98 (2d Dept., 2004), aff'd. as mod., 4 N.Y.3d 627 (2005), citing ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York Univ. Med. Ctr.***, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (***Sheppard-Mobley v. King, supra***; ***Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra)***. If the movant meets his burden, the burden shifts to the opposing party to establish the existence of a material issue of fact. ***(Alvarez v. Prospect Hosp., supra)***. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, (***Demshick v. Community Housing Management Corp.***, 34 A.D.3d 518, 521, 824 N.Y.S.2d 166 (2d Dept., 2006), citing ***Secof v. Greens Condominium***, 158 A.D.2d 591, 551 N.Y.S.2d 563 [2d Dept., 1990]).

"To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury (quotations omitted)." (***Sampson v. Contillo***, 55 A.D.3d 588, 865 N.Y.S.2d 634 (2d Dept., 2008), citing ***Nichols v. Stamer***, 49 A.D.3d 832, 854 N.Y.S.2d 2 (2d Dept., 2008), quoting ***Berger v. Becker***, 272 A.D.2d 565, 565, 709 N.Y.S.2d 418 [2d Dept., 2000]). "In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital were] negligent." (***Taylor v. Nyack Hospital***, 18 A.D.3d 537, 795 N.Y.S.2d 317 [2d Dept., 2005] citing ***Alvarez v. Prospect Hosp., supra***). Thus, a moving defendant doctor and/or hospital has "'the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was not injured thereby.'" (***Chance v. Felder***, 33 A.D.3d 645, 823 N.Y.S.2d 172 (2d Dept., 2006) quoting ***Williams v. Sahay***, 12 A.D.3d 366, 368, 783 N.Y.S.2d 664 (2d Dept,. 2004), citing ***Alvarez v. Prospect Hosp., supra; Johnson v. Queens-Long Island Medical Group, P.C.***, 23 A.D.3d 525, 526, 806 N.Y.S.2d 614 (2d Dept., 2005); ***Taylor v. Nyack Hospital, supra; see also, Thompson v. Orner***, 36 A.D.3d 791, 828 N.Y.S.2d 509 [2d Dept., 2007]).

A moving defendant must address and rebut the specific factual allegations set forth in the complaint and the Bill of Particulars. (***Terranova v. Finklea***, 45 A.D.3d 572, 845 N.Y.S.2d 389 (2d Dept., 2007); ***Hutchinson v. Berenstein***, 22 A.D.3d 527, 801 N.Y.S.2d 766 (2d Dept., 2005); citing ***Seefeldt v. Johnson***, 13 A.D.3d 1203, 787 N.Y.S.2d 594 (4th Dept., 2004); ***Vinvini v. Insel,*** 1 A.D.3d 351, 766 N.Y.S.2d 569 (2d Dept., 2003); ***Muscatello v. City of New York***, 215 A.D.2d 463, 627 N.Y.S.2d 567 (2d Dept., 1995); ***Ritt by Ritt v. Lenox Hill Hosp.***, 182 A.D.2d 560, 582 N.Y.S.2d 712 [1st Dept., 1992]). "[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law." (***Grant v. Hudson Valley Hosp. Center***, 55 A.D.3d 874, 866 N.Y.S.2d 726 (2d Dept., 2008), citing ***Berkey v. Emma***, 291 A.D.2d 517, 518, 738 N.Y.S.2d 250 (2d Dept., 2002); ***Drago v. Chung Ho King***, 283 A.D.2d 603, 604, 725 N.Y.S.2d 859 (2d Dept., 2001); ***Terranova v. Finklea, supra; Kuri v. Bhattacharya***, 44 A.D.3d 718, 842 N.Y.S.2d 734 [2d Dept., 2007]). And, an expert may not make conclusions which are based on facts not in evidence or are directly contradicted by the evidence. (See, ***Holbrook v. United Hosp. Medical Center***, 248 A.D.2d 358, 669 N.Y.S.2d 631 (2d Dept., 1998); see also, ***Kaplan v. Hamilton Medical Associates, P.C.***, 262 A.D.2d 609, 610, 692 N.Y.S.2d 674 [2d Dept., 1999]).

If the moving party meets his burden, in opposition, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury." (***Domaradzki v. Glen Cove Ob/Gyn Assocs.***, 242 A.D.2d 282, 660 N.Y.S.2d 739 (2d Dept., 1997) citing ***Cerkvenik by Cerkvenik v. County of Westchester***, 200 A.D.2d 703, 607 N.Y.S.2d 66 (2d Dept., 1994); ***Caggiano v. Ross***, 130 A.D.2d 538, 515 N.Y.S.2d 274 (2d Dept., 1987); ***Amsler v. Verrilli***, 119 A.D.2d 786, 501 N.Y (2d Dept., 1986); see also, ***Mosezhnik v. Berenstein***, 33 A.D.3d 895, 823 N.Y.S.2d 459 [2d Dept., 2006]). "To establish proximate cause, the plaintiff must present 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury." (***Alicea v. Liguori***, 54 A.D.3d 784, 785, 864 N.Y.S.2d 462 (2d Dept., 2008), quoting ***Johnson v. Jamaica Hosp. Med. Ctr.***, 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept., 2005) and citing ***Holton v. Sprain Brook Manor Nursing Home***, 253 A.D.2d 852, 678 N.Y.S.2d 503 (2d Dept., 1998), lv den. 92 N.Y.2d 818 (1999); see also, ***Zak v. Brookhaven Memorial Hosp. Medical Center***, 54 A.D.3d 852, 863 N.Y.S.2d 821 (2d Dept., 2008), citing ***Lyons v. McCauley***, 252 A.D.2d 516, 675 N.Y.S.2d 375 (2d Dept., 1998), lv den. 92 N.Y.2d 814 [1998]). "'The plaintiff's evidence may be deemed legally sufficient even if his expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury.'" (***Alicea v. Liguori, supra***, quoting ***Flaherty v. Fromberg***, 46 A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept., 2007) and citing ***Barbuto v. Winthrop University Hosp.,*** 305

A.D.2d 623, 624, 760 N.Y.S.2d 199 (2d Dept., 2003); ***Wong v. Tang***, 2 A.D.3d 840, 769 N.Y.S.2d 381 (2d Dept., 2003); ***Jump v. Facelle***, 275 A.D.2d 345, 712 N.Y.S.2d 162 (2d Dept., 2000), lv den., 98 N.Y.2d 612 [2002]).

"It is well settled that to maintain an action to recover damages for medical malpractice, the existence of a doctor-patient relationship is necessary." (***Von Ohlen v. Piskacek***, 277 A.D.2d 375, 717 N.Y.S.2d 221 (2d Dept., 2000), citing ***Heller v. Peekskill Community Hosp.***, 198 A.D.2d 265, 603 (2d Dept., 1993); ***Lee v. City of New York***, 162 A.D.2d 34, 560 N.Y.S.2d 700 (2d Dept., 1990), app den. 78 N.Y.2d 863 [1991]). "An implied physician-patient relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional." (***Raptis-Smith v. St. Joseph's Medical Center***, 302 A.D.2d 246, 755 N.Y.S.2d 384 (1st Dept., 2003), citing ***Cogswell v. Chapman***, 249 A.D.2d 865, 672 N.Y.S.2d 460 (3d Dept., 1998); see also, ***Campbell v. Haber***, 274 A.D.2d 946, 710 N.Y.S.2d 495 [4th Dept., 2000]). Joint action in the diagnosis or treatment pursued by a doctor is a sufficient predicate for liability. (***Mandel v. New York County Public Adm'r.***, 29 A.D.3d 869, 870-871, 815 N.Y.S.2d 275 [2d Dept,. 2006]). A "physician can be held vicariously liable for another physician's active negligence if the physician held 'some control of' the actively negligent physician's 'course of treatment' of a patient." (***Ross v. Mandeville***, 45 A.D.3d 755, 846 N.Y.S.2d 276 (2d Dept., 2007), citing ***Kavanaugh by Gonzales v. Nussbaum***, 71 N.Y.2d 535, 523 N.E.2d 284, 528 N.Y.S.2d 8 (1988); ***Graddy v. New York Med. Coll.***, 19 A.D.2d 426, 243 N.Y.S.2d 940 (1st Dept., 1963), motion den. 13 N.Y.2d 1175 (1964), motion den. 13 N.Y.2d 1187 [1964]; see also, ***Deane v. Islam***, 23 Misc.3d 1128(A), 2009 WL 1412631 (Supreme Court Richmond County 2009). Under those circumstances, liability may be apportioned based on each doctor's relative responsibility and fault. (***Mandel v. New York County Public Adm'r., supra***, citing ***Walker v. Zdanowitz***, 265 A.D.2d 404, 696 N.Y.S.2d 509 (2d Dept., 1999); ***Harrison v. Dombrowski***, 175 A.D.2d 37, 573 N.Y.S.2d 87 (1st Dept., 1991); ***Riley v Wieman***, 137 A.D.2d 309, 528 N.Y.S.2d 925 [3d Dept., 1988]).

At her examination-before-trial, Ms. Glicksman testified that she was a sales representative for a pharmaceutical company and that she knew Dr. Federbush through work. Although she never saw him as a patient, she listed him as her doctor at the hospital because she knew him to be a doctor in the area. She also testified that she did not recall seeing him at the hospital nor did she recall being instructed at the hospital to follow up with her primary physician.

The defendant Dr. Rosenzweig, the doctor who treated Ms. Glicksman in the Emergency Room, testified at his examination-before-trial that he called Dr. Federbush to tell him that his patient was in the Emergency Room, to relay her condition which he thought was the flu, and to tell Dr. Federbush that he had initiated treatment. He asked him to come examine her. He testified that Dr. Federbush told him that he was already aware of Ms.

Glicksman's presence in the Emergency Room because a family member had contacted him and he said that he was busy in his office but that he would come in to see her at some point. Dr. Rosenzweig testified that he saw Dr. Federbush go in the curtained-off area where Ms. Glicksman was in the Emergency Room and heard him examine her and question her regarding her symptoms. He also testified that Dr. Federbush looked at Ms. Glicksman's chart and had access to the results of all of her diagnostic studies. Dr. Rosenzweig further testified that he answered all of Dr. Federbush's questions about Ms. Glicksman's course of treatment and that they discussed the results of Ms. Glicksman's diagnostic studies and how they were addressed. Dr. Rosenzweig testified that he and Dr. Federbush had a conversation in the Emergency Room in front of Ms. Glicksman and they agreed that she had a viral syndrome, that her condition had improved in the Emergency Room and that she would be discharged and told to follow up with Dr. Federbush within the following couple of days. Dr. Rosenzweig testified that Dr. Federbush provided the discharge instructions.

At his examination-before-trial, Dr. Federbush denies the sum and substance of Dr. Rosenzweig's testimony. He testified that Dr. Rosenzweig called him to tell him that Ms. Glicksman was in the Emergency Room, that he thought she had the flu and that he was sending her home. Dr. Federbush testified that they never discussed Ms. Glicksman's complaints, Dr. Rosenzweig's examination of her, her tests or the results and that he did not advise Dr. Rosenzweig regarding Ms. Glicksman's treatment or her discharge. He testified that he only saw Ms. Glicksman in the Emergency Room to say hello; he did not examine her or review her chart nor did he discuss her case with Dr. Rosenzweig. Dr. Federbush denied any role in Ms. Glicksman's care and treatment or her discharge.

Ms. Glicksman's hospital record contains a progress note which states "patient states Dr. Federbush will be in to see the patient." Her discharge paper reads "Discharged home per Dr. Rosenzweig's instructions." Her discharge instructions read "Special Advise" which instructs Ms. Glicksman to "call Richard Federbush, M.D., today or the next business day for an appointment to be seen within next two days if not improving. When you call to make the appointment, tell the secretary that you were referred from this facility. When you go to see the doctor, bring these instructions with you."

In support of his motion, Dr. Federbush has submitted the affirmation of Ian Newmark, M.D., who is a board certified Internist who has subspecialties of Critical Care Medicine and Pulmonary Disease. Having reviewed the Bill of Particulars, Ms. Glicksman's medical records and the testimony given by the plaintiffs and Drs. Rosenzweig and Federbush at their examinations-before-trial, Dr. Newmark opines to a reasonable degree of medical certainty that there was no act or omission by Dr. Federbush that proximately caused Ms. Glicksman's injuries. He notes that Ms. Glicksman was never admitted to the hospital nor was her care ever transferred from the Emergency Room staff to any other physicians, therefore, only an Emergency Room doctor could transfer or discharge her. He states that Dr.

Federbush was never called upon for a consult. He additionally notes that Dr. Federbush's response when he was contacted by Mr. Glicksman to inform him that his wife was in the Emergency Room was that he had an office full of patients and he did not know if he would even be able to come to the hospital to see her. He opines that that response was entirely appropriate. He further opines that absent a formal request for a consult, even if Dr. Federbush was Ms. Glicksman's primary care doctor, an examination should not be done and Dr. Federbush would in any event have no authority to make any decisions regarding her care. He explains "[w]here a doctor has not been requested to come in to provide a consultation as a specialist in the Emergency Department setting, that doctor has no duty to perform an examination and in fact cannot write orders and cannot take over the decision to admit or discharge the patient." And, Dr. Newmark remarks that their cordial greeting in the Emergency Room did not impart any duty on Dr. Federbush. Lastly, he opines that even if Dr. Rosenzweig believed that Dr. Federbush examined Ms. Glicksman, albeit mistakenly, it would still be Dr. Rosenzweig's responsibility to render a diagnosis and treatment plan as well as to make the discharge decision. As for the recommendation that Ms. Glicksman follow up with her primary care physician, he notes that the plaintiffs never contacted Dr. Federbush following her discharge from the hospital.

The defendant Dr. Federbush has not established his entitlement to summary judgment. Nowhere in his analysis is Dr. Rosenzweig's testimony regarding the sequence of events and Dr. Federbush's role in them addressed in a meaningful manner. Contrary to his assertions, his testimony is not incredible as a matter of law. (See, ***Santos v. Rosing***, 60 A.D.3d 500, 875 N.Y.S.2d 59 [1st Dept., 2009] citing ***Alvarez v. Prospect Hosp., supra***, at p. 324-325). In any event, assuming, *arguendo*, that Dr. Federbush did establish his entitlement to summary judgment thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact, they have met that burden.

In opposition to the defendant Dr. Federbush's motion, the plaintiff has submitted an affirmation of a Board Certified Internist who reviewed Ms. Glicksman's medical records, the testimony given at the examinations-before-trial and Dr. Newmark's affidavit. He opines to a reasonable degree of medical certainty that Ms. Glicksman should not have been discharged. He further opines that if Dr. Federbush's involvement was as testified to by Dr. Rosenzweig, then Dr. Federbush departed from good and accepted standards of medical care in his participation in the care and treatment of Ms. Glicksman. He explains that "[i]t was a departure from accepted standards of care on the part of any physician involved in the process of evaluating and determining the management and disposition status of [Ms. Glicksman] to have discharged [her] on January 13, 2006. Pursuant to accepted standards of care as they existed in 2006, this patient should have been admitted to the hospital, worked up for sepsis and placed on IV antibiotics. Additionally, the patient should have had cardiac monitoring given the finding of kypokalemia." He further opines that "if [Ms. Glicksman] had been admitted and treated, as the standard of care required, it is [his] opinion, stated to

with [sic] a reasonable degree of medical certainty that [Ms. Glicksman] would not have progressed to suffer from bilateral pneumonia and would not have suffered the complications of respiratory failure, pleural effusion and ARDS (Adult Respiratory Distress Syndrome]. Additionally, she would not have needed the various invasive and surgical procedures that she had to undergo as a result of the untreated pneumonoccal sepsis." Thus, it is his opinion "that the failures to timely and properly evaluate, examine and properly admit the patient for appropriate treatment were all substantial contributing factors in causing the injuries suffered by Sharon Glicksman." He concludes "[t]o be clear, once Dr. Federbush undertook to evaluate the patient himself by speaking to the patient, examining the patient and looking at the patient's chart, he had a duty to properly evaluate the patient and make appropriate treatment decisions for the patient. Dr. Federbush had every opportunity, under the facts as relayed by Dr. Rosenzweig, to timely and properly diagnose and treat this patient, and his failure to do so was a departure from accepted standards of medical care as they existed in 2006."

In light of the issues of fact regarding Dr. Federbush's role in treating Ms. Glicksman, the plaintiff has established the existence of a material issue of fact. Dr. Federbush's motion is denied. (See, ***Santos v. Rosing, supra,*** citing ***Raptis-Smith v. St. Joseph's Medical Center, supra; Cogswell v. Chapman, supra***; see also, ***Campbell v. Haber, supra***).

The foregoing constitutes the Order of this Court.

Dated: July 13, 2009
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED

JUL 23 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE