At an IAS Term, Part 15 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 19th day of August, 2009.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

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NATALE ROTONDI ,

Plaintiff,

- against - Index No. 21927/06

NEW YORK PRESBYTERIAN HOSPITAL., et al.,

Defendants.

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The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-6
Reply Affidavits (Affirmations)	7-9
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant David Sahar, M.D. moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserted against him. Defendant Henry M. Sponitz, M.D. and New York Presbyterian Hospital (the hospital) move, by separate motions, for an order, pursuant to the same statute, granting summary judgment dismissing the complaint insofar as asserted against them.

On June 4, 2005, the then 81 year old plaintiff Natale Rotondi was brought to the hospital's emergency room after experiencing an episode of lightheadedness or dizziness and nausea while visiting his daughter that evening. The plaintiff told the emergency room nurse that he had taken his pulse during this episode and that it was very low. By the time he arrived at the emergency room, he was asymptomatic, but reported a history of diabetes, hypertension, angina, and prostate cancer. Plaintiff was admitted to the hospital to undergo cardiac monitoring or telemetry.

According to Dr. Sahar, a cardiologist at the hospital, his examination of plaintiff on June 6th, and his review of the results of the heart monitoring, led him to a preliminary diagnosis of "sick sinus syndrome" in that plaintiff was experiencing episodes of both tachycardia (fast heart rate) and bradychardia (slow heart rate). Dr. Sahar ordered thyroid function tests and an echocardiogram to rule out structural heart disease. The next day Dr. Sahar noted that both test results were normal and that continued monitoring of plaintiff's heart rate revealed that he had rates as high as 140 beat per minute and as low as in the 50s. Based on these results, Dr, Sahar recommended that plaintiff have a pacemaker implanted. At his deposition, the doctor explained that a pacemaker was appropriate because the beta blockers that would need to be administered to treat the high heart rates could cause plaintiff's periodic low heart rates to go dangerously low; the pacemaker would prevent this from occurring. Dr. Spotnitz implanted the pacemaker into plaintiff's chest on June 8, 2005.

Thereafter, plaintiff underwent a cardiac catheterization to determine his risk of suffering a heart attack; that test revealed that plaintiff left anterior descending coronary artery was 100% blocked. Plaintiff was released from the hospital after Dr. Sahar advised him that the best way to treat this blockage was with medication, rather than surgery. At his deposition, Dr. Sahar explained that research has shown that where the patient is asymptomatic and only one artery is blocked, medication is as effective a treatment as surgery.

On June 28, 2005, plaintiff went to the emergency room at Maimonidies Hospital (Maimonidies) complaining of excruciating pain at the operative site, around which a hematoma had formed. It was discovered that an infection had developed around the pacemaker; the consulting cardiologist at Maimonidies found no evidence that plaintiff was suffering from sick sinus syndrome and thus advised him that the pacemaker could be removed. On June 29, the infected pacemaker was removed.

Thereafter, on February 13, 2006 plaintiff was seen at the Mamonidies emergency room complaining of chest pains and shortness of breath. Plaintiff was admitted to Mamonidies and, after a heart attack was ruled out, plaintiff was released two days later with instructions to see his cardiologist. On March 3, 2006, plaintiff underwent a cardiac catherization which revealed blockage in two of plaintiff's vessels. As a result, a single bypass grafting from his left internal thoracic artery to his left anterior descending coronary artery was performed.

On or about July 24, 2006, plaintiff commenced this action sounding in medical malpractice and lack of informed consent against Drs. Sahar and Spotnitz and New York Presbyterian Hospital, claiming, *inter alia*, that the defendants misdiagnosed him as suffering from sick sinus syndrome and, as a result of that misdiagnosis, improperly implanted the pacemaker. Defendants now make these summary judgment motions.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After such a showing, if the party opposing the motion comes forward with admissible evidence that there are issues of fact requiring a trial, the motion will be denied (*Rebecchi v Whitmore*, 172 AD2d 600, 601 [1991]). Moreover, in order to grant the drastic remedy of summary judgment "it must clearly appear that no material and triable issue of fact is presented ...'issue finding rather than issue-determination is the key to [a motion for summary judgment]'" (*Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976], *quoting*, *Sillman v Twentieth Century - Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Finally, the evidence presented by the nonmoving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to him or her (*id*). "Where there is any significant doubt whether there is a material triable issue of fact or where the material issue of fact is 'arguable' summary judgment must be denied" (*Strychalski v Mekus,* 54 AD2d at 1069, *quoting*, *Moyer v Briggs*, 47 AD2d 64, 66-67 [1975]). Applying

these principles to the case at bar, and as discussed below, the court concludes, that the defendants' summary judgment motions should be granted only to the extent that a portion of the malpractice claim, as well as the claim asserting lack of informed consent must be dismissed.

Medical Malpractice

To establish a prima facie case of liability in a medical malpractice action, the plaintiff must prove that the defendant physician deviated or departed from good and accepted standards of medical practice, and that the departure was the proximate cause of injury or damage" (*Roseingrave v Massapequa General Hospital*, 298 AD2d 377, 379 [2002]; *see Williams v Sahay*, 12 AD3d 366 [2004]; *Sheridan v Bieniewicz*, 7 AD3d 508 [2004]). In order to sustain this burden, the plaintiff "must present expert opinion testimony that the defendant's conduct constituted a deviation from the requisite standard of care" (*Pace v Jakus*, 291 AD2d 436, 436-437 [2002]; *see also Perrone v Grover*, 272 AD2d 312 [2000]).

Here, each defendant meets their burden with the affirmations of their experts. In support of his motion, Dr. Sahar submits the affirmation of Richard A. Stein, M.D., who is Board-certified in internal medicine and cardiovascular disease, and who concludes that Dr. Sahar appropriately recommended placement of a pacemaker in plaintiff in accordance with the guidelines of the American Heart Association (AHA). Dr. Stein further concludes that Dr. Sahar appropriately, and in accordance with those same guidelines, recommended treating plaintiff's single vessel asymptomatic disease with medication rather than surgery.

Noting that a normal heart rate ranges from 60-100 beats per minute, Dr. Stein points to the fact that the cardiac monitoring revealed that plaintiff was experiencing continued episodes of slow heart rates down to 37 beats per minute (bradycardia) as well as rapid heat rates up to 137 beats per minute (tachycardia). According to Dr. Stein, these results, as well as the negative findings from the cardiac tests ordered by Dr. Sahar to rule out other causes of these irregularities, appropriately led Dr. Sahar to make the diagnosis of "tachy-brady" or "sick sinus" syndrome. Dr. Stein explains that while medicine, usually a beta blocker, can address the rapid heart rate issue, a pacemaker must first be inserted to prevent the already low heart rates from dropping to dangerous lows.

Dr. Stein states that the AHA guidelines recommend pacemaker placement for minimally symptomatic patients with heart rates lower than 40 beats per minute while awake and, thus, concludes that since plaintiff had heart rates as low as 37 beats per minute while awake during three days of continuous cardiac monitoring, Dr. Sahar's recommendation for placement of a pacemaker to prevent his heart rate from dropping too low was appropriate. He further notes that bleeding and infection are recognized and acceptable risks of pacemaker placement and, thus, the fact that plaintiff may have developed these complications is not evidence of any departure from good and accepted medical practice.

Finally, Dr. Stein opines that the recommendation for medical treatment, rather than surgical intervention, following the results of plaintiff's cardiac catheterization which showed a blockage in a single vessel, was appropriate and in keeping with AHA guidelines.

Dr. Stein further notes that plaintiff's cardiologist, Dr. Feldman, was aware of these results, but nonetheless did not recommend cardiac surgery to plaintiff until nine months later when plaintiff began experiencing symptoms of angina and when a further catheterization revealed progressive disease and decreased left ventricular function.

In support of his summary judgment motion, Henry M. Spotnick, M.D. submits the affirmation of Dr. Michael Graver, Board-certified in general and thoracic surgery, who concludes that Dr. Spotnitz did not deviate from good and accepted practice in the field of cardiac surgery in the care and treatment of plaintiff. According to Dr. Graver, given the telemetry readings which indicated that plaintiff was experiencing both slow and rapid heart rates, Dr. Spotnick appropriately concurred with plaintiff's medical team that a pacemaker was appropriate. As to the hematoma and infection which developed around the site of the pacemaker, Dr. Graver notes that, given the fact that they did not develop until ten days after surgery, it may have been caused by something unrelated to that surgery. In any event, states Dr. Graver, even if there was some relationship between the procedure and these later complications, this would not be evidence of malpractice on the part of Dr. Spotnitz since both a bleeding and infection is an accepted risk of the procedure.

Finally, in its motion, the hospital incorporates by reference and adopts the arguments and affidavits of both doctors and notes that if the court finds that the doctors are not liable for any injury to plaintiff, then there can be no vicarious liability on the part of the hospital.

With these affidavits, each defendant has met its burden of proof on the issue of medical malpractice. The burden now shifts to plaintiff to demonstrate a triable issue of fact.

Plaintiff meets his burden with respect to the issue of medical malpractice in regard to the placement of the pacemaker, but fails to meet this burden in regard to Dr. Sahar's recommendation that the plaintiff's blockage in one cardiac artery be treated medically, rather than surgically.

In support of his motion, plaintiff submits the affirmation of Dr. Howard Feldman, Board-certified in cardiology and internal medicine, who was plaintiff's treating physician before and after the complained of negligence.[1] Dr. Feldman opines that Drs. Sahar and Spotnitz misdiagnosed plaintiff as suffering from sick sinus syndrome, which led them to needlessly and inappropriately implant a pacemaker in plaintiff's chest, causing his injuries. According to Dr. Feldman, the symptoms experienced by the 81 year old plaintiff at his daughter's house which landed him in the hospital's emergency room - dizziness, stomach discomfort, sweatiness, nausea, and faintness - were consistent with many different causes, appear to have been transient. The doctor notes that plaintiff is in his 80s, suffers from diabetes and high blood pressure, and had not eaten for a while before the symptoms came on. In light of these factors, as well as the fact that plaintiff was asymptomatic when he arrived at the hospital, states Dr. Feldman, the doctors should have made more of an effort

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[1] The court refers herein to the opinions addressed in both Dr. Feldman's affirmation, addressed only to Dr. Sahar's motion, and his reply affirmation, which addresses the motions of all three defendants.

to rule out other causes of plaintiff's symptoms before concluding that he was suffering from sick sinus syndrome. Dr. Feldman points out that there are various tests available to confirm a diagnosis of sick sinus syndrome, and the record does not indicate that any of those tests were done.

Dr. Feldman does not appear to be in disagreement with the opinion of defendants and their experts that a patient with a heart rate dropping to as low as 37 and raising to as high as 137 might be an appropriate candidate for a pacemaker. Instead, he challenges their contention that plaintiff's heart rate ever dropped that low. While acknowledging that the nurses documented on plaintiff's chart that his heart rate slowed briefly to 37-39 beats a minute, Dr. Feldman points out that the monitoring strip attached to this note do not corroborate this finding, but rather show a rate in the 60s. In fact, states the doctor, none of the strips provided by the defendants document a heart rate in the 30s at any time during the monitoring. Moreover, Dr. Feldman points out that the nurse's notes also indicate that plaintiff was breathing easy on room air, his heart was in a regular rhythm and that he had good pulses and no nausea or vomiting.

According to Dr. Feldman, none of the typical manifestations of sick sinus syndrome, which he notes is a relatively uncommon syndrome, that should appear on the EKG strips were present here. For example, states the doctor, in patients with this syndrome, after a period of rapid heart rate, there is often seen a long pause of two seconds or more between heart beats, which was not present here. Dr. Feldman explains that in order to diagnose sick

sinus syndrome, there must be documentation of sinus node dysfunction which was not present here, and "associated symptoms" of the syndrome, also not seen in plaintiff. In the later regard, the doctor notes that plaintiff was asymptomatic while at the hospital.

Dr Feldman also points out that he had prescribed beta blockers for plaintiff before his hospitalization [2], and notes that, while it is somewhat unclear from plaintiff's chart, it appears that doctors in the emergency room ordered that additional beta blockers be given to plaintiff. According to Dr. Feldman, a patient taking a beta blocker may exhibit a slowed heart rate, and, the ingestion of more than one may cause a significant drop. Thus, explains Dr. Feldman, a pacemaker is only indicated if this slow heart rate is present in the absence of these medications - a fact which he claims was not considered by defendant doctors.

Finally, the doctor notes that, even if plaintiff's heart rate dropped to the 30s, that rate was only recorded by the nurses near sleep time, and, in a patient with minimal symptoms, a pacemaker would only be appropriate if he or she has a chronic heartbeat of less than 30 beats per minute while awake.

Dr. Feldman concludes that the pacemaker was unnecessary and was the direct cause of the infection and bleeding which plaintiff developed.

Since it is clear that the experts are in sharp disagreement as to whether the placing of the pacemaker was appropriate, summary judgment as to this issue must be denied "since it is for the fact finder and not the motion court to resolve the credibility issues presented"

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[2] It does not appear from the hospital records that this medication was documented by the emergency room staff.

(*see Feinberg v Feit*, 23 AD3d 517, 519 [2005]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2003]); *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650 [2001]).

The court, however, grants the motion to the extent that it dismisses that portion of the medical malpractice claim which asserts that Dr. Sahar negligently treated the plaintiff's blocked arterty, finding that plaintiff has failed to satisfy his burden on that issue. In his bill of particulars, plaintiff claims that defendants failed to recommend and perform cardiac bypass surgery. However, Dr. Feldman does not dispute or even address the opinion of Dr. Sahar and his expert that medical treatment, rather than surgery, is appropriate for an asymptomatic patient with a blockage in only one artery. Instead, while, acknowledging that plaintiff was told to follow-up with his cardiologist after his cardiac catherization, Dr. Feldman complains that when plaintiff saw him, he had "no understanding concerning the blockage" and "despite many attempts to get [plaintiff's records from the hospital] ... it was months later that [Dr. Feldman] ... first learned about the blockage and this delayed treatment of the problem." However, there is no evidence that any negligence on the part of defendants prevented him from obtaining the records. Moreover, the doctor fails to identify any injury resulting from this alleged delay in treatment. Thus, the court dismisses that part of the medical malpractice cause of action relating to the cardiac catherization.

Informed Consent

The court also grants that portion of the summary judgment motion seeking to dismiss the informed consent cause of action. In his affirmation, Dr. Feldman states that defendants

should have informed plaintiff of the "true state of his condition", as well as the risks and alternatives to pacemaker placement.

Both defendants testified that they explained the procedure to the plaintiff, and while plaintiff did not remember if they had, he identified his signature on the informed consent form on which both bleeding and infection are listed as complications of the surgery. To the extent that a language barrier may have made it difficult for him to fully understand the doctors' words, both of his daughter's testified that Dr. Sahar explained the procedure to them and one of those daughters stated that the doctor sat at the computer with her and, with the aid of a diagram of the heart, advised her why the pacemaker is needed.

Indeed, plaintiff's informed consent claim appears to be based on his expert's opinion that the procedure was unnecessary, and thus, since plaintiff was not informed of that fact, any consent he gave could not have been a knowing one. However, that opinion "merely provides further evidence of negligent treatment and does not support a separate claim for lack of informed consent." (*Benfer v Sachs*, 3 AD3d 781, 783 [2004]; *see Parese v Shankman*, 300 AD2d 1087, 1088 [2002]; *Elliot v Fay*, 105 AD2d 512, 513 [1984]).

Accordingly, defendants' motions for summary judgment are granted only to the extent that that portion of the medical malpractice cause of action that relates to the cardiac catherization is dismissed and the cause of action sounding in lack of informed consent is likewise dismissed.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.