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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 07

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

FUENTES,ELENA

Index №. **0006118/2005**

-against-

Hon..**WILMA GUZMAN** ,

ST. BARNABAS HOSPITAL

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **SUMMARYJUDGEMENT DEFENDANT**
Noticed on **August 18 2008** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion for Summary Judgment for Defendant is decided in accordance with the attached Decision/Order dated 1/8/09

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

RECEIVED
BRONX COUNTY CLERK'S OFFICE
JAN 22 2009
PAID ☐ NO FEE ☐

RECEIVED
BRONX COUNTY CLERK'S OFFICE
JAN 22 2009
PAID ☐ NO FEE ☐

Dated: 1/8/09

Hon._____
WILMA GUZMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 6118/05
Motion Calendar No.5,6,7
Motion Date: 10/6/08

ELENA FUENTES ,

Plaintiff(s),

-against-

ST. BARNABAS HOSPITAL, MARC DANZIGER M.D. BRONX LEBANON HOSPITAL CENTER, GEORGE LAZAROU, M.D. LORETTA SULLIVAN, M.D., EDWARD GEISLER, M.D., ILIANA ROBINSON

Defendant(s).

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to amend caption to add defendant

Papers	**Numbered**
Danziger Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Plaintiff Affirmation in Opposition of Danziger Motion and Exhibits thereto	**2**
Danziger Reply Affirmation	**3**
Plaintiff Motion for Default Judgment	**4**
Danziger Affirmation in Opposition	**5**
St. Barbanas Cross-Motion to Dismiss	**6**
Robinson Cross-Motion, Affirmation in Support and Exhibits Thereto	**7**
Lazarou's Notice of Motion, Affirmation in Support and Exhibits Thereto	**8**
Plaintiff's affirmation in Opposition	**9**
Lazarou Reply Affirmation	**10**

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Plaintiff commenced this action seeking damages for injuries sustained as a result of the alleged medical malpractice of the named defendants between October 17 and November 13, 2003. For purposes of disposition, all motions and cross-motions are consolidated and decided as follows:

Dr. Marc Danziger

Defendant Marc Danziger, M.D., moves pursuant to C.P.L.R. § 3215(c) dismissing the plaintiff's complaint on the grounds that the action has been abandoned and that plaintiff failed to properly serve defendant Danziger and therefore the court lacks jurisdiction over this defendant. Plaintiff submitted written opposition to defendant Danziger's motion indicating that the action has not been abandoned and that any question as to whether defendant was properly served should be reserved for a Traverse Hearing.

Plaintiff also submits a motion for a default judgment against defendant Danziger for failure to file an answer within twenty days of service of the summons and complaint. Defendant Danziger opposes this motion on the grounds of improper service.

Plaintiff filed the summons and complaint in the instant action on January 4, 2005. Plaintiff's affidavit of service filed in March, 2005 indicates that on February 25, 2005 plaintiff served defendant Danziger by leaving the summons and complaint with Antonia Armanda, a person of suitable age at defendant Danziger's place of business, 4422 Third Avenue, Bronx, New York. The affidavit of service further indicates that plaintiff then mailed the summons and complaint to 4422 Third Avenue, Bronx, New York on February 26, 2005. Furthermore, plaintiff argues that law office failure as the reason for the delay in filing the motion for a default judgment in that the law office failed to notice that one of the seven named defendants in this litigation failed to answer. Plaintiff subsequently filed for a default judgment as to this defendant.

Defendant Danziger asserts that he never received the summons and complaint. He does not know Antonia Armada and he does not practice at the 4422 Third avenue address. Rather, his principal place of business is 4487 Third Avenue, Bronx, New York and 2016 Bronxdale Avenue, Bronx, New York. Defendant Danziger further asserts that on October 1, 2007 a preliminary conference was held and defendant Danziger was not present. Nor was this defendant present at the January 30, 2008 preliminary conference.

C.P.L.R.§ 3215 requires that where a plaintiff fails to take proceedings for the entry of a judgment *within one year of default*, the court shall not enter judgment but shall dismiss the complaint unless *sufficient cause* is shown why the complaint should not be dismissed. (Emphasis added). Although, pursuant to C.P.L.R. § 2005, law office failure may constitute a reasonable

excuse for delay, such is not the case here. Robinson v. New York City Transity Authority, 203 A.D.2d 531 (2nd Dept. 1994); Shepard v. St. Agnes, 86 A.D.2d 628 (2nd Dept 1982); Costello v. Reilly, 36 A.D.3d 581 (2nd Dept. 2007); Gayle v. Parker, 300 A.D.2d (1st Dept. 2002). The plaintiff has not shown good cause for failure to move for a default judgment within the statutory one year time frame. Plaintiff merely asserts that due to the numerous amount of defendants, they inadvertently failed to keep track of whether defendant Danziger submitted an answer in the instant matter. It should also be noted that plaintiff did not move for a default judgment until after defendant Danziger moved to dismiss pursuant to C.P.L.R. 3215(c). Furthermore, plaintiff fails to submit an affidavit of merit from a physician attesting that her cause of action is meritorious. Hoffman v. Salitan, 203 A.D.2d 91, (1st Dept. 2001); Recht v. Teuscher, 176 A.D.2d 863 (2nd Dept. 1991). As such, defendant Danziger's motion to dismiss the complaint as to this defendant is granted.

Consequently, as plaintiff's moving papers are insufficient to establish any independent theory of liability, defendant St. Barnabas Hospital's cross-motion to dismiss based upon the lack of vicarious liability is also granted. Magriz v. St. Barnabas Hospital, 43 a.D.3d 331 (1st Dept. 2007).

The Law

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp ., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or

flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

It has long been held that summary judgment is a drastic remedy, the procedural of a trial which should only be granted when the evidence presented leaves no material issue of fact unresolved. see Andre v. Pomeroy, 35 N.Y.2d 361 (1974). Consequently, it has also been long settled that the court's function on such a motion is issue finding rather than issue determination Sillman v Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957)..

The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Zuckerman v City of New York, 49 N.Y.2d 557 (1980).

To establish a claim for medical malpractice a plaintiff must show that the medical treatment rendered was a deviation from the accepted medical practices and that said deviation or departure was a proximate cause or substantial factor contributing to the plaintiff's injuries. Wiands v. Albany Med. Ctr., 29 A.D.3d 982 (2nd Dept. 2006). To support a prima facie case for summary judgment in a medical malpractice case a defendant may offer the supporting affirmation, in admissible form, of a medical expert to establish that the treatment rendered did not deviate from the standard of practice and care. Alvarez v. Prospect Hosp. 68 N.Y.2d 320, supra; Dicintio v. Lawrence Hosp. 25 A.D.3d 320 (1st Dept. 2006). In opposition, the plaintiff may offer the sworn affidavit submitted in admissible form of a medical expert to raise a triable issue of fact. Feliz ex rel. Rios v. Beth Israel Med. Ctr., 38 A.D.3d 396 (1st Dept. 2007).

Dr. Iliana Robinson, M.D.

Defendant Iliana Robinson, M.D. moves to dismiss the plaintiff's complaint pursuant to C.P.L.R. §§ 3211(a)(7) and C.P.L.R 3212 on the grounds that plaintiff and defendant Robinson did not have a physician-patient relationship between the time period alleged. Plaintiff did not submit written opposition.

In support of the motion, defendant Robinson submits, inter alia, a copy of the pleadings, a sworn affidavit from defendant Robinson, and the plaintiff's medical records from St. Barnabas Hospital and Bronx Lebanon Hospital.

In her affidavit, defendant Robinson affirms that she is a physician licensed to practice medicine in the State of New York, Board Certified in obstetrics and gynecology. Between 1997 and 2005, defendant Robinson was affiliated with Bronx Lebanon Hospital where she had clinical responsibilities, performed surgery and delivered babies. Dr. Robinson affirms that she performed the following treatment on plaintiff: a pap smear on August 16, 2000, a Loop Electrical Excision Procedure on December 19, 2000, an examination on July 25, 2001, an examination on August 28, 2001 when she prescribed Cleocin, an examination on December 15, 2001 where plaintiff had urinary complaints. Dr. Robinson ordered a urine culture and a sonogram and informed the plaintiff to return to the clinic which she did on February 15, 2002. On February 15, 2002 that she performed a repeat sonogram and repeat pap smear. On April 17, 2002, plaintiff's examination revealed extensive condyloma lesions on the labia. On September 13, 2002, plaintiff had further complaints of urinary tract infection like symptoms and was recommended to see a uro-gynecologist. On December 4, 2002, Dr. Robinson prescribed flagyl, an antiobotic. On March 5, 2003, Dr. Robinson performed another Pap Smear and underwent work up for possible cystistis. On April 16, 2003, Dr. Robinson performed a repeat testing of plaintiff's creatine level and blood urea nitrogen level and prescribed levaquin, an antibiotic. On July 18, 2003, Dr. Robinson performed a colposcopy on plaintiff. Dr. Robinson testified that she did not treat plaintiff between August 2003 and December 15, 2003. When Dr. Robinson next saw plaintiff on December 15, 2003, plaintiff had underwent renal stone/ureteral obstruction surgery and removal of a tube from the urethra. Dr. Robinson did not have any privileges at St. Barnabas Hospital.

In as much as a liberal reading of the plaintiff's complaint, in a light most favorable to the plaintiff, establishes a cause of action of medical malpractice as to defendant Robinson, the plaintiff's complaint is nonetheless dismissed pursuant to C.P.LR. § 3212. Defendant Robinson submitted sufficient proof to establish prima facie entitlement to summary judgment, specifically that Dr. Robinson did not treat plaintiff during the time period in which the alleged malpractice occured. Plaintiff did not submit any reports or arguments in opposition so as to raise a triable issue of fact or rebut defendant Robinson's prima facie entitlement to summary judgment. In fact, plaintiff did not respond to plaintiff's motion at all. As such, defendant Robinson's for summary judgment is hereby granted.

Dr. George Lazarou

George Lazarou, M.D. moves this Court, pursuant to C.P.L.R. § 3212 for an Order dismissing the plaintiff's complaint on the grounds that there exists no triable issue of fact as to this defendant's liability in the treatment of plaintiff. Plaintiff submitted written opposition.

In support of the motion for summary judgment, defendant Lazarou submits inter alia, a copy of the pleadings, plaintiff's medical records, defendant Lazarou's sworn affidavit and the affidavit of Dr. Jonathan Vapnek.

Dr. Lazarou affirms that he is a physician licensed to practice in New York State. He is Board certified in the field of obstetrics and gynecology with a subspecialty practice in the field of urogynecology. He is affiliated with Bronx Lebanon Hospital. He does not practice or have any privileges with St. Barnabas Hospital. Dr. Lazarou affirms that he treated plaintiff between February 4, 2003 and September 23, 2003. Dr. Lazarou first evaluated plaintiff on February 4, 2003 when she complained of painful urination, pain with a full bladder and urinary urgency and frequency. On March 11, 2003, plaintiff had the same complaints and Dr. Lazarou supervised and concurred with the resident physicians course of treatment which included a cystoscopy whith hydrodystension (with possible biopsy) to rule out interstitial cystitis. Dr. Lazarou performed this procedures on plaintiff in addition to a biopsy of plaintiff's bladder tissue. The biopsy report confirmed that plaintiff suffered from interstitial cystitis. Dr. Lazarou treated plaintiff on May 20,

2003 when she presented with complaints of the return of her urinary urgency and frequency, pain with a full bladder, and pain upon urination. Dr. Lazarou recommended treatment with Elmiron, which is used to treat the symptoms associated with cystitis. Plaintiff presented for a follow-up on September 23, 2003 on which date Dr. Lazarou affirms that plaintiff informed that she was not taking the prescribed medicine. Dr. Lazaraou, prescribed an antibiotic and directed the patient to return after four weeks. On October 28, 2003, plaintiff presented to Dr. Lazarou and informed him that she had been diagnosed at St. Barnabas Hospital with hydronephrosis caused by a kidney stone. Dr. Lazarou affirms that this diagnosis is outside the scope of his field of urogyenecology. The diagnosis, being strictly urological, resulted in Dr. Lazarou referring plaintiff to a urologist, who upon information and belief was Dr. Geisler, also affiliated with Bronx Lebanon. Dr. Lazarou affirms that a urogynecologist would not treat a patient for kidney stones or hydronephrosis and the plaintiff did not complain of any symptoms indicative of interstitial cystitis or anything urogynecological. Other than the referral to Dr. Geisler, Dr. Lazarou affirms that he did not treat plaintiff on October 28, 2003.

Dr. Vapnek affirms that he is a physician licensed to practice medicine in New York State and that he is Board Certified in the field of urology. Dr. Vapnek affirms that he reviewed plaintiff's medical records maintained by Bronx Lebanon Medical Center, St. Barnabas Medical Center and Dr. Eward Geisler. Dr. Vapnek opined, within a reasonable degree of medical certainty that Dr. Lazarou administered good and proper treatment to plaintiff, consistent with the prevailing standard of care and that Dr. Lazarou's treatment of plaintiff in no way impacted upon or had any relation to the subsequent placement of her ureteral stent, or the treatment she received subsequent to that procedure, such as the removal of the stent. Dr. Vapnek opines that a urogynecologist is different from a urologist in that a urogynecologis is a gynecologist who, in addition to having a specialized training with respect to the female reproductive system, has specialized training in issues concerning the bladder and the anatomical structures between the bladder and the vagina. A urogynecologist does not treat kidney or ureter issues, as those are "upstream" of the bladder. Based upon his review of the records, Dr. Vapnek concluded that Dr. Lazarou would not and did not render any treatment in regards to plaintiff's kidneys or ureters.

Dr. Vapnek informs that the course of treatment to determine whether plaintiff suffered from

interstitial cystitis was proper in that plaintiff complained of urinary frequency, urgency and pain and did not respond to medicinal treatment. He described interstitial cystitis as a condition that is characterized by an inflamed, thick or stiff bladder wall with visible ulcerations and glomerulations. Patients suffering from this condition may exhibit painful urination, urinary frequency, pain with a full bladder, pain and tenderness in the region of the bladder and/or pelvis and/or pain with sexual intercourse. During the cystoscopy, a clinician will perform hydrodystension of the bladder for optimal visualization. Hydrodystenstion may also relieve some of the urinary frequency and urgency symptoms associated with interstitial cystitis. On April 1, 2003, Dr. Lazarou performed the cystocopy with hydrodystention at Bronx Lebanon Hospital which confirmed plaintiff had interstitial cystitis. Her follow-up exam on April 15, 2003 revealed improved urological symptoms which may have been attributed to the cystoscopy and hydrodystension. In May 20, 2003, plaintiff returned to Dr. Lazarou with complaints of the return of the urinary urgency and frequency. Dr. Lazarou recommended treatment with Elmiron, which plaintiff reported on September 23, 2003 that she had not been taking. Dr. Lazarou then precribed Bactrim to rule out urinary tract infection.

On October 13, 2003, plaintiff arrived at St. Barnabas Hospital emergency department with complaints of lower right quadrant pain and pain upon urination. Plaintiff was diagnosed with hydroureternephrosis caused by a small calcification in her right ureter. On October 17, 2003, Dr. Marc Danziger performed a cystoscopy during which he inserted a double-J stent which had the purpose of opening the ureter and restoring the flow of urine from the right kidney to the bladder. She was then discharged from the hospital. On October 27, 2003, plaintiff returned to St. Barnabas Hospital with complaints of blood in her urine and lower abdominal pain. The medical records revealed that plaintiff infomed the ED physician of her recent diagnosis of kidney stones and the placement of the stent in her ureter. She was diagnosed with hermaturia, given analgesics for pain and instructed to follow up at the urology clinic.

On October 28, 2003, plaintiff presented to Dr. Lazarou, who noted in the Bronx Lebanon Chart that plaintiff required a referral to a urologist in light of her recent diagnosis with and treatment for kidney stones at St. Barnabas Hospital. Upon the referral to Dr. Geisler, Dr. Lazarou never saw plaintiff again. That same day, Dr. Edward Geisler, a urologist noted that plaintiff had recently been treated for a kidney stone and complained of blood in her urine. He prescribed that

plaintiff antibiotic and instructed that plaintiff have an x-ray of her kidneys, ureter and bladder. This study performed on October 30, 2003 revealed the presence of a stent in her right distal ureter. Dr. Vapnek noted that the records reveal that plaintiff had this stent placed in her by Dr. Danziger at St. Barnabas Hospital and not by any clinician at Bronx Lebanon Hospital. On November 13, 2003, Dr. Geisler reevaluated plaintiff and concluded that the kidney stone had passed and he removed the stent from plaintiff. On December 15, 2003, plaintiff presented at Bronx Lebanon Health Center to Dr. Robinson. Plaintiff's information to Dr. Robinson was that Dr. Geisler removed the "tube" that had been placed in her unknowingly at St. Barnabas Hospital on October 17, 2003. Dr. Vapnek opines that the records reveal that the stent was only removed when the kidney stone, previously diagnosed by St. Barnabas had passed.

Based upon the time line of the events as revealed by the medical records, Dr. Vapnek opined to a reasonable degree of medical certainty that the treatment rendered by Dr. Lazarou was entirely commensurate with the prevailing standard of care. Furthermore, based upon the sequence of events, Dr. Lazarou's treatment of plaintiff ended prior to the placement of her right ureteral stent and thus could not have contributed in any way to the injury plaintiff sustained as a result of the stent.

In opposition, plaintiff does not submit the affirmation of any medical expert to raise any triable issue of fact so as to contradict Dr. Vapnek's assessment of the facts or medical opinion. Bumbaca v. Bonanno, 39 A.D.3d 577 (2nd Dept. 2007). Instead plaintiff relies solely on the affirmation of plaintiff's counsel which indicates that Dr. Lazarou did not take the time to examine plaintiff on October 28, 2008, and had he done so would have discovered the stent. Plaintiff's counsel neglects to address the assertions made by Dr. Vapnek who indicates that the medical record revealed that plaintiff was in fact seen at St. Barnabas Hospital on October 27, 2008. Nor does plaintiff address the distinctions drawn between a urogynecologist and a urologist as laid out in Dr. Vapnek's non-conlcusory affirmation. Rather, plaintiff focuses on missing medical records between October 28, 2003 and December 15, 2003. However as Dr. Lazarou and Dr. Vapnek indicate, Dr. Geisler treated plaintiff between this time. And any missing medical records would be attributed to the treatment of Dr. Geisler, not Dr. Lazarou. As such, plaintiff has failed to submit sufficient proof in admissible form to defeat defendant Lazarou's establishment of prima facie entitlement to summary judgment.

Accordingly it is

ORDERED that defendant Danziger's motion to dismiss pursuant to C.P.L.R. § 3215 is hereby granted and the plaintiff's compliant is dismissed as to defendant Dr. Marc Danziger. It is further

ORDERED that plaintiff's motion for a default judgment as to defendant Danziger is hereby denied. It is further

ORDERED that defendant St. Barnabas' Cross-Motion to dismiss is hereby granted.

ORDERED that defendant Robinson's motion for summary judgment is hereby granted and the plaintiff's complaint is dismissed as to defendant Dr. Iliana Robinson. It is further

ORDERED that defendant Lazarou's motion for summary judgment is hereby granted and the plaintiff's complaint is dismissed as to defendant Lazarou.

The Clerk of the Court is directed to mark the court file dismissed as to defendants Danziger, St. Barnabas, Robinson and Lazarou only.

Defendant Danziger shall serve a copy of this order with Notice of Entry upon all parties within thirty (30) days of entry of this order.

This constitutes the decision and order of this Court.

JAN 0 8 2009

DATE

HON. WILMA GUZMAN
Justice Supreme Court.