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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 3
NASSAU COUNTY

OSCAR ORLANDO REYES,

Plaintiff,

ORIGINAL RETURN DATE: 09/11/09
SUBMISSION DATE: 12/17/09
Index No. 9482/08

-against-

NASSAU UNIVERSITY MEDICAL CENTER; NASSAU HEALTH CARE CORPORATION; FRANKLIN HOSPITAL CENTER; "JOHN DOE", name being fictitious and unknown to the plaintiff, as it is illegible in the record, but intended to be the emergency room doctor who removed the nail from plaintiff's eye on April 26, 2007; and ATUL CHAVDA, M.D.,

Defendants.

MOTION SEQUENCE # 1

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by defendants, Franklin Hospital Center ("Franklin Hospital") and Atul Chavda, M.D. ("Dr. Chavda"), seeking an order pursuant to CPLR 3212 awarding them summary judgment dismissing plaintiff's complaint as asserted against them is granted. The court notes that the action was discontinued as to defendants, Nassau University Medical Center (the "Medical Center") and Nassau Health Care Corporation, by stipulation dated July 2, 2009.

Plaintiff commenced the within personal injury action sounding in medical malpractice allegedly arising out of the removal of a foreign object from plaintiff's eye on April 26, 2007.

Plaintiff testified that on the day of the accident at about 4 p.m., while he was working on a table putting nails in a door to affix it to the frame, the nail went into the wood and then shot back into his eye (Movant's Ex. D, pp. 12-13). An ambulance arrived and brought plaintiff to the Medical Center (Id., pp. 15-16). Plaintiff testified that he was told that he had to wait for the doctor as

he needed surgery (Id., p. 20). The doctor spoke to plaintiff on the telephone and informed plaintiff that he did not know if he was going to be able to get there that evening or the following morning (Id., p. 21). Plaintiff testified that he could not stand the pain any longer and decided to leave the hospital at about 10 p.m. (Id., pp. 22-23). His friend took him to Franklin Hospital where plaintiff went straight to the emergency room (Id., p. 27). Plaintiff testified that a doctor there "looked in my eye, he opened my eye up and he took the nail out with his fingers . . . the eye specialist wasn't there" (Id., pp. 27-28). Plaintiff went to the eye specialist the next day and was told that his eye was in a "very delicate situation" (Id., p. 30). Thereafter plaintiff presented to Dr. Perry who informed him that he would do surgery on May 1st to put a lens in his eye (Id., p. 34). After the surgery, plaintiff received laser treatments from Dr. Stoler (p. 41).

As amplified in plaintiff's verified bill of particulars, plaintiff alleges the following with respect to Franklin Hospital and Dr. Chavda: Defendants carelessly and negligently removed a nail from plaintiff's eye on April 16, 2007; failed and neglected to order consults or consultations with, and to await the arrival of, an ophthalmologist; in performing an improper and inadequate surgical procedure or contraindicated surgical procedure upon plaintiff which permitted his condition to progress and worsen resulting in catastrophic permanent injuries, including corneal laceration on the right eye, scar formation, traumatic cataract of the right eye, resulting in phacoemulsification with posterior chamber lens implant on May 1, 2007.

Defendants submit that plaintiff was not injured by any act or omission by Dr. Chavda in removing the foreign object from plaintiff's eye but that the alleged damages are due to the impact of the foreign object into plaintiff's eye. In support of their application Franklin Hospital and Dr. Chavda submit the Franklin Hospital record, as well as the Medical Center chart. The admitting diagnosis contained in the chart of the Medical Center is "corneal foreign body" (Movant's Ex. H). The impression of the CT scan was: "Metallic foreign body lodged in the right globe anteriorly possibly piercing the lens" (Id.) The progress notes in the Franklin Hospital record of Dr. Margulis, dated April 16, 2007, indicate that "OR attending removed a staple from the cornea" and his impression was "puncture penetrating wound on self sealing laceration on traumatic cataract" (Movant's Ex. E).

Also submitted is the affidavit of William Beck, M.D. Dr. Beck avers that he is a Board Certified ophthalmologist. After a review of the records, Dr. Beck opined that "the patient's traumatic cataract in the right eye and the need for subsequent cataract extraction and placement of intraocular lens was directly related to the trauma of the staple entering the lens of the right eye" (Movant's Ex. F, ¶ 11). Moreover, it was Dr. Beck's opinion that "no omission nor commission by Dr. Chavda, or any employee of Franklin Hospital Medical Center at the time of removal of the staple, caused or contributed to the development of the traumatic cataract and the need for intraocular lens implantation" (Id., ¶ 12).

Dr. Chavda testified that he was trained in ophthalmology emergency (Movant's Ex. G, p. 21). He stated that "we did a thorough examination with the microscope which showed that there is a metallic foreign body which looked like a staple in his right eye" (Id., p . 16). He further

testified that he explained to plaintiff that the object was almost coming out of his eye and that if plaintiff was willing he could remove it (Id., p. 18). Dr. Chavda stated that in response, plaintiff wanted the foreign body to be removed as he was in a lot of pain (Id., pp. 18-19). He explained the procedure regarding treatment to plaintiff: "that we are going to put some drops in the eye which are local anesthesia, then we will take the foreign body out" (Id., p. 22). A small forceps was used, and Dr. Chavda testified that there was no effort in doing it and that he did not use his hand at all (Id., p. 28). Dr. Chavda testified that after removal of the foreign object, he consulted with Dr. Margolis, who informed him that there doesn't seem to be any damage except a small hole but we will see what develops tomorrow (Id., p. 25)

With regard to plaintiff's second cause of action based upon lack of informed consent, defendants submit that plaintiff has not shown that any lack of consent was the proximate cause of the injury. As noted above, Dr. Beck opined that Dr. Chavda's treatment was not the proximate cause of the injuries. Pursuant to Public Health Law § 2805-d(3) in order to maintain a cause of action for lack of informed consent, plaintiff must establish that a reasonably prudent person in his position would not have undergone the treatment if he or she had been fully informed and "that the lack of consent is a proximate cause of the injury or condition for which recovery is sought."

Within the particular context of a medical malpractice action, a plaintiff opposing a defendant's motion for summary judgment is required to proffer evidentiary facts sufficient to rebut the defendant's *prima facie* showing that he or she or it was not negligent in order to show the existence of a triable issue of fact (*Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept. 1994]). Allegations of a general and conclusory nature which are not supported by competent and admissible evidence and which do not demonstrate the essential elements of a medical malpractice action are not sufficient to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The essential elements of a medical malpractice action are comprised of the following: (1) a deviation or departure from accepted practice and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358 [2d Dept. 1998]).

Franklin Hospital and Dr. Chavda have submitted competent evidence that they did not depart from good and accepted practice when Dr. Chavda removed the foreign object from plaintiff's eye. In the matter*sub judice*, based upon the heretofore referenced deposition testimony coupled with the affidavits submitted and the averments therein contained, Franklin Hospital and Dr. Chavda have demonstrated their *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to plaintiff to submit competent evidence showing a departure from accepted practice and a nexus between the alleged negligence and plaintiff's injury (*Alvarez v Prospect Hosp., supra*).

In opposition to Franklin Hospital's and Dr. Chavda's application, plaintiff submits the redacted affirmation of a board certified physician in ophthalmology. The doctor opines that Dr. Chavda's removal of the staple in the emergency room as opposed to an operative setting was a departure from acceptable practice and compromised the condition of Mr. Reye's eye (Pl's Ex. B, p. 3).

He further opines that "the foreign object may have traumatized Mr. Reye's cornea causing the anterior chamber to become shallow thus making Dr. Chavada's choice of treatment a department from appropriate care" (Id.). The doctor concludes that "due to the departure from acceptable care and treatment rendered by Dr. Chavda, Mr. Reyes eye was compromised and damaged further increasing his risk for the detached retina which he has suffered" (Id., p. 4).

Defendants retort that plaintiff did not claim in his bill of particulars that he suffered a detached retina. Moreover, it is submitted that the affirmation of plaintiff's expert lacks factual support. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment" (*Flanagan v. Catskill Regional Med. Ctr.*, 65 AD3d 563, 565 [2d Dept. 2009]).

Plaintiff also relies on the testimony of plaintiff relating to his alleged conversation with Dr. Perry regarding Dr. Chavda's treatment, which testimony is hearsay. It is well settled that unsubstantiated hearsay is insufficient to raise a triable issue of fact (*Garcia v Prado,* 15 AD3d 347 [2d Dept. 2005]; *Ventriglio v Staten Island University Hosp.*, 6 AD3d 525 [2d Dept. 2004]).

Viewing the evidence in a light most favorable to plaintiff, as is required when deciding a motion for summary judgment, the court concludes that the evidence proffered by plaintiff has failed to raise a triable issue of fact.

Defendants, Franklin Hospital and Dr. Chavda, are accordingly awarded summary judgment dismissing plaintiff's claims against them. As Dr. Chavda was the emergency room doctor sued herein as "JOHN DOE," plaintiffs' complaint is dismissed in its entirety without costs.

This decision constitutes the order of the court.

Dated: 2-22-10

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C. XXX

ENTERED
MAR 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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