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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

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

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PATRICIA A. McCORMACK,

Plaintiff(s),

-against-

NORTH SHORE UNIVERSITY HOSPITAL AT PLAINVIEW, FADIL PEJCINOVIC, KATHIE BRAND, M.D., MITCHELL T. KESCHNER, M.D. and URVASHI KAPOOR, M.D.,

Defendant(s).

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Index No. 13503/07

Motion Submitted: 9/23/10
Motion Sequence: 007, 008, 009

The following papers read on this motion:

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

The motions by defendant Kathie Brand, M.D. ("Dr. Brand"), defendant Mitchell T. Keschner, M.D. ("Dr. Keschner") and defendants North Shore University Hospital at Plainview ("Hospital") and Fadil Pejcinovic ("Pejcinovic"), all requesting orders granting them summary judgment pursuant to CPLR § 3212 are denied for the reasons set forth herein.

Plaintiff commenced this action for medical malpractice. Plaintiff alleges defendants caused and mismanaged or misdiagnosed a developing hematoma on the dorsal or top portion of plaintiff's right hand. The hematoma allegedly developed after a blood draw during plaintiff's admission to Hospital from November 7, 2006 to December 13, 2006.

Plaintiff, upon admission to Hospital on November 7, 2006, was a seventy-five year-old with various ailments including a history of obesity, high blood pressure, chronic venous stasis, cellulites, arthritis, and non-insulin diabetes. She was brought to the hospital due to complaints of shortness of breath on exertion. Plaintiff was on the blood thinner Coumadin, which required frequent blood draws to monitor plaintiff's condition. Dr. Brand was plaintiff's physician for many years before her November, 2006 hospital stay. Pejcinovic, an employee of Hospital was the phlebotomist assigned to draw blood from plaintiff. Plaintiff contends Pejcinovic caused plaintiff's right hand to develop the hematoma by using poor judgment in withdrawing blood from plaintiff's right hand dorsal area. Plaintiff contends Hospital did not properly monitor or train Pejcinovic and also alleges Dr. Brand should have ordered a surgical and/or plastic surgery consult when Dr. Brand examined plaintiff's hand on November 17, 2006. Plaintiff alleges Dr. Keschner should have drained the hematoma and/or ordered a surgical and/or plastic surgery consult.

Dr. Brand first saw her long time patient in the hospital on November 8, 2006 and followed her until the Patient's discharge. On November 16, despite noting improvement secondary to the warm compresses, Dr. Brand ordered a consult with Dr. Keschner due to swelling. Dr. Brand saw that plaintiff developed a blister on November 20th and continued the warm compresses and gave instructions as to elevation and exercise. On November 22, plaintiff developed serosanguinous drainage from the blister and continued the same treatment. On November 24 there was a recurrence of the blister. On November 25, Dr. Zitner noticed the blister was open and draining and he spoke with Dr. Brand about a plastic surgery consult, which occurred the same day.

On either November 11th or 12th, the Plaintiff developed swelling and a hematoma on the dorsum of her right hand, which was treated by Dr. Brand by the use of warm compresses. On November 17th an orthopedic consult was requested and that was the first time Dr. Keschner saw the plaintiff. At that time she had pain in her right hand, which was swollen and had a significant hematoma, with paraesthesia along the dorsal aspect of her hand, with limited flexion. X-Rays were ordered to rule out a fracture, no further blood draws were to be made from that hand and elevation and passive and active flexion were ordered. By November 20th, Plaintiff had less pain with some reduction of swelling and reduction of her blister. On November 23 the blister was draining. By November 25th the site was demarcated and the blister was opened and serous fluid was drained. A plastic surgery consult was ordered and additional fluid was drained. On November 29th the demarcated wound was debrided and necrotic tissue removed by the plastic surgeon. On December 1, 2006 the plastic surgeon performed a skin graft to repair the wound site due to skin loss.

To establish a *prima facie* case of liability in a medical malpractice action, the plaintiff must show that the defendant physician, hospital, hospital employee, etc., departed

from good and accepted standards of medical practice and that the departure was the proximate cause of the injury or damage (***Murray v. Hirsch***, 58 A.D.3d 701, 871 N.Y.S.2d 673 (2d Dept., 2009); ***Bowman v. Chasky***, 30 A.D.3d 552, 817 N.Y.S.2d 153 (2d Dept., 2006); ***Biggs v. Mary Immaculate Hospital***, 303 A.D.2d 702, 758 N.Y.S.2d 83 [2d Dept., 2003]).

"[O]n a motion for summary judgment dismissing the complaint in a medical malpractice action, 'the defendant doctor 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'" (***Starr v. Rogers***, 44 A.D.3d 646, 843 N.Y.S.2d 371 (2d Dept., 2007), quoting ***Williams v. Sahay***, 12 A.D.3d 366, 368, 783 N.Y.S.2d 664 (2d Dept., 2004); see ***Gargiulo v. Geiss***, 40 A.D.3d 811, 836 N.Y.S.2d 276 (2d Dept., 2007); ***Alvarado v. Miles***, 32 A.D.3d 255, 820 N.Y.S.2d 39 (1st Dept., 2006), lv to app granted 8 N.Y.3d 810 (2007), aff'd. 9 N.Y.3d 902 [2007]. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325, 501 N.E.2d 572, 508 N.Y.S.2d 92 (1986); see ***Kremer v. Buffalo Gen. Hosp.***, 269 A.D.2d 744, 703 N.Y.S.2d 622 (4th Dept., 2000); ***Juba v. Bachman***, 255 A.D.2d 492, 493, 680 N.Y.S.2d 626 (2d Dept., 1998), lv to app den. 93 N.Y.2d 809 [1999]).

An expert's affidavit may be deemed sufficiently probative to defend summary judgment if the affidavit makes reference to outside material of a kind accepted in the profession as reliable in forming a professional opinion and such reference is accompanied by evidence establishing the out-of-court material's reliability (*see* ***Romano v. Stanley***, 90 N.Y.2d 444, 684 N.E.2d 19, 661 N.Y.S.2d 589 [1997]).Wwhile an expert need not be a specialist in a particular field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (***Mustello v. Berg***, 44 A.D.3d 1018, 845 N.Y.S.2d 86 [2d Dept., 2007]). Upon review of Dr. Weinstein's sworn affidavits dated July 20, 2010 and August 9, 2010, I find that he is qualified to offer an expert medical opinion in order to offer triable issues to defeat defendants' motions.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (***Miller v. Journal-News***, 211 A.D.2d 626, 620 N.Y.S.2d 500 [2d Dept., 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie*

entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (***Ayotte v. Gervasio***, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). Summary judgment is not appropriate in a medical malpractice action when the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution (***Roca v. Perel***, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept., 2008); ***Barbuto v. Winthrop University Hospital,*** 305 A.D.2d 623, 760 N.Y.S.2d 199 [2d Dept., 2003])

Plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for the first time in opposition to the motion (***Yousefi v. Rudeth Realty, LLC***, 61 A.D.3d 677, 877 N.Y.S.2d 132 (2d Dept., 2009); ***Mathew v. Mishra***, 41 A.D.3d 1230, 838 N.Y.S.2d 292 [4th Dept., 2007]). However, the purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial, not to provide evidentiary material (***Moran v. Hurst***, 32 A.D.3d 909, 822 N.Y.S.2d 564 [2d Dept., 2006]). Here, the allegations in the bill of particulars were sufficient to alert Dr. Brand to plaintiff's theory of liability in a medical malpractice action that Dr. Brand should have consulted a "surgeon" be it vascular or plastic about the plaintiff's condition (*see* ***Rivera v. County of Suffolk***, 290 A.D.2d 430, 736 N.Y.S.2d 95 [2d Dept., 2002]). Plaintiff is claiming Dr. Brand needed a "surgical" consult whether a plastic surgeon, vascular surgeon, etc. Her claim is such that Dr. Brand is on notice that plaintiff alleges a surgical consult was needed to stop the hematoma from becoming the size of a small melon. Plaintiff placed Dr. Brand on notice of this theory of liability well before the attempted service of plaintiff's amended bill of particulars. No improper new theory of liability is being offered herein.

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, the concept does not apply when treatment is provided by an independent physician as when the physician is retained by the patient himself; the affiliation of the doctor with the hospital not amounting to employment, is not alone sufficient to impute a doctor's alleged negligent conduct to the hospital (***Hill v. St. Clare's Hospital***, 67 N.Y.2d 72, 490 N.E.2d 823, 499 N.Y.S.2d 904 [1986]). Thus, a hospital is not vicariously liable for the acts of a private attending physician (***Walter v. Betancourt***, 283 A.D.2d 223, 724 N.Y.S.2d 728 [1st Dept., 2001]).

Here, plaintiff is not attempting to impart the alleged medical malpractice of Drs. Brand and Keschner to Hospital. Plaintiff is alleging Pejcinovic, the phlebotomist, did not properly perform the blood draws from plaintiff initially causing the hematoma and Hospital did not properly train or supervise Pejcinovic to properly draw blood from patients such as plaintiff. Plaintiff's allegations are not totally dependent upon the alleged conduct of Brand and Keschner.

While defendants experts opine that they did not depart from generally accepted

standards, Plaintiff's expert opined that Dr. Brand and Dr. Keschner departed from generally accepted standards of medical practice in that the standard of care required them to relieve the pressure by aspirating the collection of blood, which was causing swelling and that the failure to drain the hematoma was a substantial factor in causing the necrosis of the dorsal skin and that such could have been avoided had they timely ordered a surgical or plastic surgery consult.

Based upon the record submitted, multiple questions of fact exist with respect to whether the defendants failed to diagnose and treat the symptoms of the plaintiff in a timely fashion, and as such, summary judgment is inappropriate. Further, summary judgment is not warranted where the parties offer conflicting expert opinion and thus a credibility issue arises requiring a jury's resolution (***Dandrea v. Hertz***, 23 A.D.3d 332 (2d Dept., 2005); ***Rosen v. Moss***, 23 A.D.3d 289 (1st Dept., 2005); ***Shields v. Baktidy***, 11 A.D.3d 671 (2d Dept., 2004); ***Barbuto v. Winthrop University Hosp.***, 305 A.D.3d 623 [2d Dept., 2003]).

For the foregoing reasons, summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: January 7, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.