SHORT FORM ORDER

INDEX No. 08-34207
CAL. No. 10-01546MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-23-10 (#001)
MOTION DATE 12-7-10 (#002)
ADJ. DATE 1-18-11
Mot. Seq. # 001 - MD
002 - MD

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ANTHONY D'ONOFRIO and GAIL D'ONOFRIO,

Plaintiffs,

- against -

ARMEN OVSEPIAN, M.D., SOUTHSIDE HOSPITAL, INC. and NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (001) by the defendant Ovsepian dated October 28, 2010 and supporting papers numbered 1-17; Notice of Cross Motion (002) by plaintiffs dated November 29, 2010 and supporting papers numbered 18-22; (2) Affirmation in Opposition by the defendants Southside Hospital and North Shore-Long Island Jewish Health System, Inc. dated December 28, 2010 and supporting papers numbered 23-25; (3) Reply Affirmation by the plaintiffs dated January 20, 2001 and supporting papers numbered 28-29; Reply Affirmation by Southside Hospital and North Shore-Long Island Jewish Health System, Inc. dated January 12, 2011and supporting papers numbered 26-27; (4) Other30-31; 32-34; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by the defendant Armen Ovsepian, M.D. and motion (002) by the plaintiffs Anthony D'Onofrio and Gail D'Onofrio are hereby consolidated for the purpose of determination; and it is further

ORDERED that this motion (001) by the defendant Armen Ovsepian, M.D. pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' verified complaint is hereby denied; and it is further

ORDERED that this cross motion (002) by the plaintiffs Anthony D'Onofrio and Gail D'Onofrio pursuant to CPLR 3212 for an order granting summary judgment against Armen Ovsepian, M.D., Southside Hospital, Inc., and North Shore-Long Island Jewish Health Care System, Inc. is hereby denied.

The complaint of this action sets forth causes of action sounding in negligence and medical malpractice on behalf of the plaintiff Anthony D'Onofrio and a derivative claim on behalf of his spouse, Gail D'Onofrio. It is claimed that the defendants negligently caused a four by four inch surgical gauze to remain within the plaintiff's chest when an ICD was implanted on April 7, 2006 at Southside Hospital, and that the defendants failed to take proper steps to account for the gauze sponge before closing the surgical incision, failed to search for the gauze, and otherwise departed from the standard measures to account for surgical gauzes. It is further claimed that the defendant Dr. Ovsepian failed to promptly and timely diagnose Mr. D'Onofrio's condition and complaints after surgery and unduly delayed in performing further surgery for the removal of the foreign object, causing an ICD pocket infection necessitating three further surgeries and hospitalizations to remove the ICD unit and leads and to implant a new ICD unit and leads on the opposite side of the plaintiff's chest.

The defendant Armen Ovsepian, M.D. seeks summary judgment dismissing the complaint because he did not depart from accepted standards of care in his care and treatment of the plaintiff as he was advised by the nurse assisting in the procedure that ten radiopague sponges were counted both before and after the procedure, and because he relied upon the accuracy of the sponge count when closing the surgical wound.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see*, ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see*, ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting

to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see*, ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

In motion (001), Armen Ovsepian, M.D. seeks summary judgment dismissing the plaintiffs' complaint and supports the application with, inter alia, an attorney's affirmation; the expert affidavit of Stanley Schneller, M.D.; copies of the summons and complaint, answer and demands for discovery served by defendant Ovsepian, and the plaintiffs' verified bill of particulars; uncertified copies of plaintiff's medical records; unsigned copy of the transcript of the examinations before trial of Anthony D'Onofrio dated July 8, 2009, Armen, which transcript is not in admissible form as required by CPLR 3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]) and is not accompanied by an affidavit pursuant to CPLR 3116, and is, therefore, not considered.

The moving defendant's expert, Stanley Schneller, M.D., has set forth that he is licensed to practice medicine in the State of New York and is board certified in internal medicine and in cardiovascular disease. He has set forth the materials he reviewed in this matter and sets forth his opinions with a reasonable degree of medical certainty. It is Dr. Schneller's opinion that Dr. Ovsepian acted within the standard of care in his treatment of the plaintiff and that there is nothing that Dr. Ovsepian did or failed to do which caused any of the injuries claimed by the plaintiff.

Dr. Schneller sets forth that Anthony D'Onofrio first presented to Dr. Ovsepian on April 3, 2006 for evaluation for a possible implantation of a cardioverter defebrillator (ICD)[1] secondary to concerns of severe ischemic cardiomyopathy. Dr. Schneller states that based upon Mr. D'Onofrio's condition, Dr. Ovsepian appropriately concluded that Mr. D'Onofrio was a candidate for implantation of a dual chamber ICD and appropriately recommended ICD implantation for primary prevention of sudden death.

The defendant's expert continues that during the surgical procedure on April 7, 2006 at Southside Hospital, Dr. Ovsepian was assisted by a scrub nurse and a circulating nurse. He states that the scrub nurse, in this case, was responsible for conducting the sponge count both prior to and after the surgery. After separating and counting the radiopague sponges on the nursing table, the scrub nurse then had the responsibility of relaying the count to the circulating nurse who then recorded it into the operative chart. The defendant's expert states that Dr. Ovsepian relied upon the nurses to provide the correct sponge count prior to, during, and after the surgery. Dr. Schneller states that prior to Dr. Ovsepian closing the operative site, he properly swept the ICD pocket to determine whether any foreign objects remained in the patient. However, he added, this procedure is not a foolproof way to determine the presence of a foreign body in the operative site. With regard to Dr. Ovsepian, states his expert, the procedure was properly performed in all respects.

Dr. Schneller continues that after the procedure, Mr. D'Onofrio had a fluoroscopic imaging of the operative site and the ICD defibrillator, and a single frontal view of the chest revealed normal findings, which was a further indication that all sponges had been removed. Postoperatively, Mr. D'Onofrio did well and was discharged from

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[1] Dr. Schneller describes the ICD as a small battery-powered electrical impulse generator which is implanted in patients who are at risk for sudden cardiac death due to ventricular tachycardia.

Southside Hospital, but on June 12, 2006, he returned to Dr. Ovsepian with complaints of sudden swelling of the ICD pocket after physical activity. A small hematoma without drainage was noted around the ICD. Dr. Schneller states that surgical intervention was not indicated at this time as Dr. Ovsepian deduced that the swelling was the result of physical exertion rather than bacterial growth or infection. A pressure dressing was applied over the ICD pocket. On June 19, 2006, Dr. Ovsepian noted the hematoma improved significantly with the pressure dressing, which was continued, as Dr. Ovsepian found no indication for surgical intervention. On June 29, 2006, Dr. Ovsepian noted that the ICD pocket hematoma was still present so he scheduled revision of the ICD pocket to better identify and treat the cause of the swelling. This revision was performed on June 30, 2006, at which time Dr. Ovsepian identified and removed a four by four inch surgical gauze found attached to the wall of the ICD pocket. No overt infection or necrotic tissue was found. The fluid from the ICD pocket was found to be negative upon being cultured and gram stained, but increased white cells were found. Therefore, due to the high potential for infectious complications due to the elevated white blood cell count status post gauze removal, Dr. Schneller states that Dr. Ovsepian appropriately recommended an ICD extraction followed by implantation of a new defibrillator system in the right deltopectoral region, which staged procedures were performed at St. Francis Hospital on July 6 and July 13, 2006.

The plaintiff opposes this motion and submits the affirmation of his expert who is licensed to practice medicine in the State of New York and is certified in thoracic and general surgery. The plaintiff's expert sets forth the materials reviewed and states opinions with a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that both Dr. Ovsepian and the nursing staff at Southside Hospital departed from good and accepted standards of practice in their care and treatment of the plaintiff, and that such departures were the proximate cause of the damages and injuries sustained by him.

With regard to Dr. Ovsepian, the plaintiff's expert states that good medical practice requires a surgeon to undertake a search of the operative area following surgery to make sure no foreign objects are left behind despite the fact that the attending nurses may have alleged that the sponge count was accurate, and that a surgeon can never simply rely on that count. The plaintiff's expert continues that Dr. Ovsepian failed to conduct a thorough, careful and vigorous search of the operative area, and if he did, as required by good practice, he would have found the same sponge which he found in the second surgery. The plaintiff's expert continues that Dr. Ovsepian admitted that he was able to palpate the gauze in the ICD pocket during the second surgery, but gives no explanation why he was unable to feel, visualize, or locate the sponge during the first surgery. The plaintiff's expert adds that leaving the sponge in the patient is alone evidence that Dr. Ovsepian departed from good and accepted medical practice which requires a surgeon to remove all foreign objects from his patient prior to closure.

With regard to the nurses at Southside Hospital, the plaintiff's expert states that they have an obligation and responsibility for keeping an accurate sponge count to prevent foreign objects from being left inside the patient, and that an error occurred in the count because ten sponges were counted before and after surgery, and another unaccounted for sponge was left in Mr. D'Onofrio.

The co-defendants, Southside Hospital and North Shore-Long Island Jewish Health System, Inc., oppose the motion for summary judgment by Dr. Ovsepian and have submitted the expert affirmation of Dr. Stephen Vlay. Dr. Vlay sets forth that he is licensed to practice medicine in the State of New York and is board certified in internal medicine with a subspecialty in cardiovascular diseases. Dr. Vlay has set forth the materials he reviewed in forming his opinion with a reasonable degree of medical certainty that Dr. Ovsepian departed from good and accepted medical practice during the April 7, 2006 surgery involving the plaintiff. It is Dr. Vlay's opinion that Dr. Ovsepian failed to have personally counted the sponges used during the procedure prior to the beginning of the implantation of the ICD; failed to have personally counted the sponges used during the procedure after the procedure was

completed, but before the patient was closed; relied solely upon the nurses for an accurate sponge count; failed to have properly swept the pocket created for the ICD; and failed to locate the four by four sponge left in the pocket. Dr. Vlay states that these departures from the standard of care were substantial contributing factors to the sponge having been left behind in the ICD pocket and the resultant need for the second procedure for removal of the sponge. Dr. Vlay further opines that had Dr. Ovsepian followed good and accepted medical practice by doing a thorough and complete search of the ICD pocket for any retained sponges, the error by the nursing staff may never have occurred.

Based upon the foregoing, it is determined that the experts for Dr. Ovsepian, Southside Hospital, Inc. and North Shore-Long Island Jewish Health Center, and the plaintiffs have adduced conflicting medical opinions. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see*, ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]). Such credibility issues can only be resolved by a jury (*see*, ***Shields v Baktidy***, *supra*; ***Halkias v Otolaryngology-Facial Plastic Surgery Assoc.***, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). Here, the parties have raised factual issues and conflicting expert opinions precluding summary judgment being granted to Dr. Ovsepian.

In motion (002), the plaintiff seeks summary judgment against all the defendants. The defendants Southside Hospital, Inc. and Northshore-Long Island Jewish Health Center oppose such motion as untimely in that motion (002) was not served by the plaintiffs until July 29, 2010 and not within the 120 days following the filing of the note of issue on July 23, 2010 (*see,* CPLR 3212). The plaintiffs contend that their motion for summary judgment is not precluded as untimely in that the issues raised in their cross motion are identical to those issues raised in Dr. Ovsepian's motion.

In ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004], the Court of Appeals made it clear that the courts should not countenance late summary judgment motions without a showing of good cause, even if it means permitting less than meritorious claims or defenses to proceed to trial. Here, the plaintiffs do not offer any cause for the delay and argue that their cross motion should be considered by this court in that the issues in both motions are identical. However, such issue of timeliness of the plaintiffs' cross motion is academic as each of the parties have submitted their expert's affirmations adducing conflicting medical opinions, thus, precluding summary judgment in any event to any of the parties.

Accordingly, motion (001) and cross motion (002) are denied.

Dated: February 22, 2011

PETER H. MAYER, J.S.C.