

Benenuto v Kohloser

2011 NY Slip Op 33167(U)

November 9, 2011

Supreme Court, Suffolk County

Docket Number: 06-31625

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-22-11
Mot. Seq. # 011 - MD # 013 - MG
012 - MG # 014 - MG

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MICHAEL BENVENUTO, Individually and as
Administrator of the Estate of MARY
BENVENUTO, deceased,

Plaintiff,

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- against -

WAGNER DOMAN & LETO P.C.
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JAMES G. KOHLROSER, M.D., RALPH
FRANK CASELNOVA, M.D., MARK
GRUDMAN, M.D., MARK GRUDMAN, M.D.,
P.C., MATTHEW T. CHENGOT, M.D.,
MATTHEW T. CHENGOT, M.D., P.C.,
AMITYVILLE HEART CENTER,
VIJAYKUMAR RATILAL SHAG, M.D.,
ORESTI JOSEPH BRUNI, M.D., CHARLES
FARBER, M.D., JEFFREY KAUFMAN, M.D.,
SHEEL KUMAR VATSIA, M.D., WSNCHS
NORTH, INC., D/B/A NEW ISLAND
HOSPITAL and NORTH SHORE UNIVERSITY
HOSPITAL AT MANHASSET,

Defendants.

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Upon the following papers numbered 1 to 62 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (011) 1 - 17; Notice of Cross Motions and supporting papers (012) 18-45; (013) 46-58; (014) 59-62; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (011) by WSNCHS North, Inc. d/b/a New Island Hospital pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against it is denied; and it is further

ORDERED that motion (012) by the defendants, Charles Farber, M.D., Mathew T. Chengot, M.D., Mathew T. Chengot, M.D., P.C., and Jeffrey Kaufman, M.D., pursuant to CPLR 3211 (a)(7) and 3212 for summary judgment dismissing the complaint is granted; and it is further

ORDERED that motion (013) by the defendant, Oresti Joseph Bruni, M.D., for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that motion (014) by WSNCHS North, Inc. d/b/a New Island Hospital for summary judgment dismissing any claims asserted against it premised upon vicarious liability for negligent acts and omissions attributable to Charles Farber, M.D., Mathew T. Chengot, M.D., Mathew T. Chengot, M.D., P.C., Jeffrey Kaufman, M.D., and Oresti Joseph Bruni, M.D., is granted as a matter of law based upon the determinations of motions (012) and (013).

This action was brought on behalf of the decedent, Mary Benvenuto. Causes of action for medical malpractice, lack of informed consent, and wrongful death have been asserted against all the defendants. Separate causes of action are asserted against North Shore University Hospital at Manhasset, and WSNCHS North Inc. d/b/a New Island Hospital, premised upon theories of negligence. A derivative cause of action is asserted against all the defendants on behalf of the decedent's spouse. It is alleged that the defendants' negligent acts and omissions began on or about January 1, 2001 and continued through November 12, 2004. It is claimed that the defendants failed to properly diagnose and treat the decedent's cardiac condition and acute congestive cardiac failure due to thrombosis of the coronary artery graft, status post-coronary artery bypass graft surgery on October 28, 2004. The death certificate indicates that Mary Benvenuto, 64 years of age, died on November 12, 2004. The cause of her death was "acute and congestive cardiac failure due to Thrombosis of coronary artery graft status post coronary artery bypass graft surgery, 10/28/04" due to "hypertensive and arteriosclerotic cardiovascular disease."

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 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 [2d Dept 1981]).

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 [2d 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 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d 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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In motion (011), the defendant, WSNCHS North, Inc. d/b/a New Island Hospital (Hospital), seeks summary judgment dismissing the complaint on the bases that it cannot be found directly liable to the plaintiff for medical malpractice in that the hospital acted appropriately in rendering care and treatment to the plaintiff's decedent during her November 11, 2004 admission, that the care provided by the hospital staff was well within the accepted standards of medical care, and that there is no causal connection between the treatment provided by the hospital staff and the injuries the plaintiff's decedent allegedly suffered.

In support of this application, defendant Hospital has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, plaintiffs' verified bill of particulars, and the answers served by the defendant Hospital with various demands; copies of the unsigned and uncertified transcripts of the examinations before trial of Michael Benvenuto dated March 13, 2008, James D. Kohlroser, D.O. dated June 4, 2008, Ralph Caselnova, M.D. dated September 5, 2008, Mark Grudman, M.D. dated November 14, 2008, Sheel Kumar Vatsia, M.D. dated April 5, 2010, and Mary Mitchell, a non-party witness dated January 21, 2011; an uncertified copy of plaintiff's medical records from New Island Hospital dated November 11, 2004; and the expert affidavit of Mark A. Goodman, M.D., sworn to August 8, 2011.

It is determined that the plaintiff's medical records are not certified and are not in admissible form as required pursuant to CPLR 3212 to be considered as admissible evidence (*see Friends of Animals v Associated Fur Mfrs.*, *supra*). Expert testimony is limited to facts in evidence. (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). Defendant Hospital's expert, Mark Goodman, M.D., reviewed the

hospital records from New Island Hospital and North Shore University Hospital at Manhasset, but the North Shore University Hospital record has not been submitted to this court.

It is further determined that the unsigned and uncertified deposition transcripts, as set forth above, are not in admissible form to be considered on a motion for summary judgment (*see* CPLR 3212, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by proof of service pursuant to CPLR 3116, and are not considered in this motion.

A copy of the amended summons and amended complaint have not been provided with the moving papers as required pursuant to CPLR 3212. Although the defendant Hospital seeks dismissal of cross claims asserted against it, the Hospital has not submitted the answers with cross claims its seeks to dismiss.

Based upon the foregoing, it is determined that the Hospital's application for summary judgment is insufficient as a matter of law, and motion (011) by New Island Hospital for summary judgment dismissing the complaint is denied.

In motion (012), the defendants, Charles Farber, M.D., Mathew T. Chengot, M.D., Mathew T. Chengot, M.D., P.C., and Jeffrey Kaufman, M.D., seek summary judgment and dismissal of the complaint pursuant to CPLR 3211 (a)(7) and 3212. The relief requested by these moving defendants is premised upon there being no physician/patient relationship between the plaintiff's decedent, Mary Benvenuto and Charles Farber, M.D., and Mathew T. Chengot, M.D.; that there is no basis to impose vicarious liability upon Mathew T. Chengot, M.D., P.C. based upon the non-existent acts of Mathew T. Chengot, M.D.; that Jeffrey Kaufman, M.D. did not deviate from accepted standards of medical practice in reading and interpreting the decedent's x-rays; that the moving defendants were not responsible for providing informed consent to the plaintiff's decedent; and that none of the moving defendants in this application departed from the accepted standards of care.

In support of this application, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the amended summons and amended verified complaint, the verified answers to the amended verified complaint served by these moving defendants, with various discovery demands; plaintiff's verified bills of particulars; copies of the unsigned and uncertified transcripts of the examinations before trial of Michael Benvenuto dated March 13, 2008 and April 11, 2008 accompanied by proof of service pursuant to CPLR 3116; the unsigned but certified transcript of the examination before trial of James D. Kohlroser, D.O. dated June 4, 2008 (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); the signed and certified copies of the transcripts of the examinations before trial of Ralph Caselnova, M.D. dated September 5, 2008 and Mark Grudman, M.D. dated November 14, 2008; a certified copy of plaintiff's medical records from New Island Hospital dated November 11, 2004; a partial, uncertified copy of plaintiff's medical record from North Shore University Hospital; an uncertified copy of an autopsy report; and the affidavits of Mark A. Goodman, M.D., sworn to August 10, 2011, James B. Naidich, M.D. dated August 11, 2011, and Charles Farber, M.D. dated August 15, 2011.

The uncertified copy of the decedent's autopsy report, and the partial copy of a medical record from North Shore University Hospital are not in admissible form to be considered on this motion for summary judgment (*see* CPLR 3212; *Friends of Animals v Associated Fur Mfrs.*, *supra*; *Allen v Uh*, *supra*; *Hornbrook v Peak Resorts, Inc.*, *supra*; *Marzuillo v Isom*, *supra*; *Stringile v Rothman*, *supra*; *O'Shea v Sarro*, *supra*).

Mathew T. Chengot, M.D. sets forth in his supporting affidavit that he is a physician licensed to practice medicine in New York State and is the president of Amityville Heart Center. He avers that he was not involved in the treatment of Mary Benvenuto at any time during her admissions to North Shore University Hospital in Manhasset from October 25, 2004 through November 8, 2004, or New Island Hospital on November 11, 2004 and November 12, 2004. He continues that although a telephone order transcribed by a nurse had been attributable to his name, it was an error as, Ralph Frank Caselnova, M.D. was the physician on call for the Amityville Heart Center on November 11, 2004. He adds that the nurse's note at 2430 hours indicates that the nurse called Dr. Caselnova. Dr. Caselnova wrote admission orders on November 11, 2004. Mark Grudman, M.D. saw the decedent for the group on November 12, 2004.

Ralph Frank Caselnova, M.D. testified at his examination before trial that he first treated Mary Benvenuto at North Shore University Hospital for a cardiac catheterization and a stenting procedure. After being discharged by her admitting physician from North Shore University Hospital, Ms. Benvenuto was admitted to New Island Hospital Emergency Department on November 11, 2004, where she was seen by Dr. Bruni, an intravenous was started, EKG and cardiac monitoring were performed, and she was given medication for vomiting prior to his arrival as a consulting cardiologist. Dr. Grudman from his group saw the plaintiff's decedent the following day. He did not speak to Dr. Chengot at all about the plaintiff's decedent while she was a patient at New Island Hospital.

Based upon the foregoing, Mathew T. Chengot, M.D. has established prima facie entitlement to summary judgment dismissing the complaint as asserted against him as Mathew T. Chengot, M.D. and Mathew T. Chengot, M.D., P.C., on the basis that he did not treat, examine, or otherwise provide care to the plaintiff's decedent during her November 11, 2004 admission to New Island Hospital. The plaintiff, who has not opposed this motion, has failed to raise a factual issue to preclude summary judgment from being granted to Mathew T. Chengot, M.D. and Mathew T. Chengot, M.D., P.C.

Accordingly, that part of motion (012) which seeks dismissal of the complaint as asserted against Mathew T. Chengot, M.D. and Mathew T. Chengot, M.D., P.C., is granted.

James B. Naidich, M.D. avers that he is a physician duly licensed to practice medicine in New York and is certified by the American Board of Radiology as well as being an examiner for the American Board of Radiology. He states that he reviewed copies of the chest radiographs of the plaintiff's decedent taken at New Island Hospital. The radiographs are dated November 11, 2004 and November 12, 2004. He also reviewed the reports of these examinations. It is Dr. Naidich's opinion with a reasonable degree of medical certainty that the defendant Jeffrey Kaufman, M.D. accurately read and properly interpreted both the portable chest x-ray film taken on the evening of November 11, 2004 and the portable chest x-ray taken on the morning of November 12, 2004. He states that it was impossible for Dr. Kaufman to have diagnosed the occluded bypass graft that was found on autopsy.

Dr. Naidich continues that Jeffery Kaufman, M.D. is a radiologist, and that his only involvement with Mary Benvenuto was to interpret the two portable chest x-rays. He states that Dr. Kaufman reported both of these chest radiographs to show an enlarged heart with an implanted cardiac device. Dr. Naidich states that interpretations of both radiographs were accurate in that the decedent's heart was enlarged and she had a cardiac pacemaker, as confirmed by autopsy. He continues that the medical examiner concluded that the cause of death was a thrombosed coronary artery bypass graph, a diagnosis which cannot be make from a portable

chest radiograph. Dr. Naidich concludes that it is also his opinion that there is nothing that Dr. Kaufman did or failed to do which was the proximate causative factor of the injuries claimed by the plaintiff.

A review of the radiograph reports contained in the New Island Hospital chart demonstrate that Dr. Kaufman interpreted the x-ray of November 11, 2004 as showing poor visualization of the left lung base, most likely on the basis of cardiac enlargement. He continues, however, that if clinically warranted, further evaluation with a PA and Lateral x-ray can be obtained. Upon comparing the x-ray of November 12, 2004 with the prior study of November 11, 2004, his impression was that of an under penetrated film demonstrating enlarged cardiac silhouette, for which he suggested further evaluation with a better penetrated film.

Based upon the foregoing, Jeffrey Kaufman, M.D. has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him. The plaintiff has not opposed this motion or raised factual issue to preclude summary judgment from being granted to Dr. Kaufman.

Accordingly, that part of motion (012) which seeks summary judgment dismissing the complaint as asserted against Jeffrey Kaufman, M.D. is granted with prejudice.

Charles Farber, M.D. avers that he is a physician duly licensed to practice medicine in New York and is board certified in internal medicine and gastroenterology. He avers that he did not see, treat, or render any care or treatment to Mary Benvenuto at any time. He states that he had no knowledge of Mary Benvenuto's presentation to the New Island Hospital on November 11, 2004, or her admission to the hospital through November 12, 2004, nor was he contacted by any one concerning her or her case. Dr. Farber continues that his review of the decedent's medical records do not indicate that he rendered care and treatment to her at any time. Although there is a reference to his name for a gastroenterology consult, that order was cancelled on November 12, 2004, and a physician from Dr. Adhami's group, namely James G. Kohlroser, M.D. was called in on consult and saw Ms. Benvenuto.

Based upon the foregoing, Dr. Farber has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him. The plaintiff has not opposed this motion or otherwise raised a factual issue to preclude summary judgment from being granted to Dr. Farber.

Accordingly, that part of motion (012) which seeks summary judgment dismissing the complaint as asserted against Charles Farber, M.D. is granted with prejudice.

In motion (013), the defendant, Oresti Joseph Bruni, M.D., seeks summary judgment dismissing the complaint on the bases that he did not depart from accepted standards of care, and that there was nothing that he did or did not do which caused or contributed to the plaintiff's decedent's death.

In support of this application, defendant Bruni has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and amended summons and complaint, his answer to the amended complaint, the answers submitted by his co-defendants, and plaintiff's verified bill of particulars; the unsigned but certified copy of the partial transcript of the examination before trial of Ralph Caselnova, M.D. dated September 5, 2008 (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); partial copy of the plaintiff's New Island Hospital record relative to Dr. Bruni's care and treatment of the plaintiff's decedent; an uncertified copy of the autopsy report which is not in admissible form; and the affidavits of Oresti Joseph Bruni, M.D. and Robert Allen Slutsky, M.D.

Oresti Joseph Bruni, M.D. avers that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine. He was an attending physician in emergency medicine in November, 2004, during his involvement in the care of the decedent, Mary Benvenuto. His care and treatment of Ms. Benvenuto was limited to the time that she presented to the New Island Hospital emergency department on November 11, 2004 at 5:33 p.m. until she was consulted by an interventional cardiologist at 5:58 p.m. Dr. Bruno continues that his shift finished at 7:00 p.m., at which time he no longer was involved in the plaintiff's decedent's care and treatment which was then being monitored by others.

Dr. Bruni states that while the plaintiff's decedent was a patient in the emergency department, he conducted an examination and determined that her chief complaint was moderate, intermittent and progressive nausea and vomiting for 24 hours, and that she denied having chest pain. Dr. Bruni continues that he took a full medical history and documented that she had hypertension, had recently undergone CABG on October 28, 2004, insertion of a pacemaker on November 5, 2004, and stent placement. He noted her current medications and made a differential diagnosis of possible gallbladder disease, food poisoning, or cardiac involvement. Dr. Bruni states that he obtained the plaintiff's decedent's vital signs, and ordered all the appropriate labs, studies, cardiac enzymes, EKG, and cardiac monitoring. She was administered Phenergan for her nausea and vomiting, and an intravenous was started in case it was necessary to administer any medications. Dr. Bruni continues that he was not present when the laboratory tests results came back to the emergency department at 8:20 p.m. after he finished his shift.

Dr. Bruni avers that he acted in accordance with the standards of emergency care in ordering the appropriate tests and studies to assist in the diagnosis of the patient, and to ensure that proper consultations were obtained. He continues that Dr. Caselnova, the plaintiff's decedent's treating cardiologist from North Shore University Hospital for her prior admission there, presented to the emergency department at New Island Hospital to examine the plaintiff's decedent from a cardiac standpoint, including interpreting her EKG at 5:58 p.m. on November 11, 2004. Dr. Bruni further opines to a reasonable degree of medical certainty that he performed his duties in accordance with good and accepted medical practice; that his treatment of the plaintiff's decedent did not in anyway contribute to the decedent's injuries or her ultimate demise on November 12, 2004; and thus, that his treatment was not the proximate cause of the decedent's alleged injuries or death.

Ralph Caselnova, M.D. testified to the extent that he is licensed to practice medicine in New York State. He was on call for his cardiology group that evening and saw Ms. Benvenuto at New Island Hospital on November 11, 2004 in the emergency department just after she was seen by the emergency department physician. He set forth the treatment provided to the plaintiff's decedent in the emergency department, including blood work, cardiac monitoring, and an EKG which showed that the pacemaker was properly functioning but also that there were some premature ventricular contractions of her heart. Dr. Caselnova determined that the plaintiff's decedent should be admitted to New Island Hospital.

Robert Allen Slutsky, M.D. avers that he is physician licensed to practice medicine in New York State and is board certified in internal medicine and emergency medicine, with sub-certification in cardiovascular disease, critical care medicine, and geriatric medicine. It is Dr. Slutsky's opinion with a reasonable degree of medical certainty that Dr. Bruni did not depart from the standards of good and acceptable medical care as he rendered comprehensive and thorough care in line with the accepted standards of emergency medicine. Dr. Slutsky set forth the plaintiff's decedent's medical/surgical history and co-morbidities, as well as her condition upon presentation to New Island Hospital emergency department on November 11, 2004. Dr. Slutsky set forth the care and treatment rendered by Dr. Bruni, inclusive of history and physical, medications, vital signs, and

the diagnostic tests and blood studies ordered by him, and opines that Dr. Bruni performed an appropriate initial examination, ordered appropriate tests and lab studies. He continues that Dr. Bruni called Dr. Caselnova, an interventional cardiologist, for cardiac consultation. Dr. Caselnova arrived in the emergency department at 5:58 p.m. and interpreted the EKG. Once Dr. Caselnova arrived at the emergency department, Dr. Bruni did not have any further involvement in the plaintiff's decedent's care and treatment as Dr. Caselnova took over her care and Dr. Bruni's shift ended at 7:00 p.m. Dr. Slutsky continues that there is nothing that Dr. Bruni did or did not do that proximately caused or contributed to the plaintiff's decedent's death.

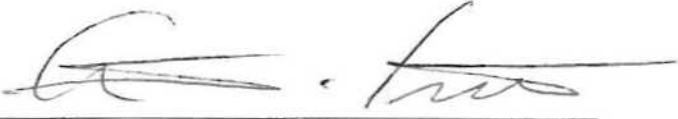
Based upon the foregoing, it is determined that Oresti Joseph Bruni, M.D. has demonstrated prima facie entitlement to summary judgment dismissing the complaint of this action as asserted against him. The plaintiff has not raised a factual issue or otherwise opposed this motion to preclude summary judgment.

Accordingly, motion (013) is granted and the complaint of this action as asserted against Oresti Joseph Bruni, M.D. is dismissed with prejudice.

In motion (014), WSNCHS North, Inc. d/b/a New Island Hospital, seeks summary judgment dismissing the complaint asserted against it premised upon its alleged vicarious liability for the actions of the defendants Charles Farber, M.D., Mathew T. Chengot, M.D., Mathew T. Chengot, M.D., P.C., Jeffrey Kaufman, M.D., and Oresti Joseph Bruni, M.D. The Note of Issue and Certificate of Readiness were filed on April 26, 2011. Pursuant to CPLR 3212, motions for summary judgment are to be served within 120 days after the Note of Issue is filed. Here, the last date to serve a motion for summary judgment was August 24, 2011, and the defendant Hospital's cross motion was not served until September 2, 2011, beyond the statutory 120 days. Counsel for the defendant offers no explanation for the untimely service of motion (014). However, based upon the determinations in motions (011), (012), and (013), it is determined as a matter of law that WSNCHS North, Inc. d/b/a New Island Hospital is not vicariously liable for any medical malpractice as to co-defendants Charles Farber, M.D., Mathew T. Chengot, M.D., Mathew T. Chengot, M.D., P.C., Jeffrey Kaufman, M.D., and Oresti Joseph Bruni, M.D. in that the complaints asserted against those co-defendants have been dismissed.

Accordingly, motion (014) is granted as a matter of law.

Dated: November 9, 2011



 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION