

Donaldson v Abulencia
2012 NY Slip Op 30539(U)
February 15, 2012
Supreme Court, Suffolk County
Docket Number: 09-16850
Judge: Peter Fox Cohalan
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INDEX No. 09-16850
CAL. No. 11-00759MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-4-11
 ADJ. DATE 12-22-11
 Mot. Seq. # 002 - MG
 # 003 - MG
 # 004 - MG

CHARLES DONALDSON,
Plaintiff,

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- against -

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& Sports Medicine, Abraham, Ticker & Lippe
114 Old Country Road
Mineola, New York 11501

ARMAND E. ABULENCIA, M.D., ISLAND
ORTHOPAEDICS & SPORTS MEDICINE,
P.C., RICHARD ABRAHAM, P.A.,
JONATHAN B. TICKER, M.D., PAUL D.
ZELENETZ, M.D., NASSAU INFECTIOUS
DISEASES, PLLC, ROBERT J. LIPPE, M.D.,
SYOSSET HOSPITAL, PLAINVIEW
HOSPITAL and NORTH SHORE LONG
ISLAND JEWISH HEALTH SYSTEM,

Defendants.

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Upon the following papers numbered 1 to 52 read on this motion for a special trial preference ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-16 ; Notice of Cross Motion and supporting papers (003) 17- 29; (003) 30-46; Answering Affidavits and supporting papers 47-50 ; Replying Affidavits and supporting papers 51-52 ; Other _____ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

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ORDERED that motion (002) by the defendants Paul D. Zelenetz, M.D. and Nassau Infectious Diseases, P.L.L.C. (hereinafter Nassau Infectious Diseases) pursuant to CPLR §3212 for summary judgment dismissing the complaint asserted against them is granted, and it is further

ORDERED that motion (003) by the defendants North Shore University Hospital d/b/a Syosset Hospital (hereinafter Syosset Hospital) and North Shore Long Island Jewish Health Systems, Inc. s/h/a North Shore Long Island Jewish Health System (hereinafter North Shore Long Island Jewish) and Plainview Hospital pursuant to CPLR §3212 for summary judgment dismissing the complaint asserted against them is granted; and it is further

ORDERED that motion (004) by the defendants, Island Orthopaedics & Sports Medicine, P.C. (hereinafter Island Orthopaedics), Richard Abraham, P.A., Jonathan B. Ticker, M.D., and Robert J. Lippe, M.D., pursuant to CPLR §3212 for summary judgment dismissing the complaint asserted against them is granted.

The plaintiff instituted this medical malpractice action for the failure of the defendants to provide Charles Donaldson (hereinafter plaintiff) with informed consent concerning his care and treatment. The plaintiff also asserts causes of action against the defendants Syosset Hospital, Plainview Hospital, and North Shore Long Island Jewish premised upon their respective negligent hiring and granting and renewing employment privileges to the defendants, residents, physician assistants, nurse practitioners, nurses and other involved in the care and treatment of the plaintiff. In January 2007, the plaintiff had surgery performed by the defendant Armand E. Abulencia, M.D. (hereinafter Abulencia) at Syosset Hospital for a shattered right tibia/fibula, which required the insertion of orthopedic pins for placement of an external fixation device after the plaintiff had fallen seventeen feet from a truck. Thereafter, Jonathan Ticker, M.D. (hereinafter Ticker), while covering for Abulencia, admitted the plaintiff to Plainview Hospital on April 3, 2007, for an infection at the insertion site of the pins. At Ticker's request an infectious disease consult was conducted by the defendant Paul D. Zelenetz, M.D. (hereinafter Zelenetz) of Nassau Infectious Diseases (hereinafter Nassau Infectious Diseases). The plaintiff alleges that the defendants failed to timely and appropriately diagnose and treat this infection causing the plaintiff to develop reflex sympathetic dystrophy, and non-union of the right ankle with contracture, deformity and inversion, among other things.

None of the defendants have set forth a cross claim in their respective answers. The plaintiff's counsel affirms that he does not oppose the motions for summary judgment submitted on behalf of the defendants Richard Abraham, P.A. (hereinafter Abraham), Ticker, Robert J. Lippe, M.D. (hereinafter Lippe), Zelenetz, Nassau Infectious Diseases, P.L.L.C., and Plainview Hospital. The plaintiff opposes the motions submitted by the defendants Syosset Hospital and North Shore Long Island Jewish Healthcare System on the basis that these defendants are vicariously liable for the negligent acts of Abulencia.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*,

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68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 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 (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for his failure to do so (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleading are real and capable of being established at a trial (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant a court as a matter of law to direct judgment in favor of any party (CPLR §3212 [b]).

The medical records submitted in support of a motion for summary judgment pursuant to CPLR §3212 must be certified to be in admissible form. 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]).

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[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that the 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***, 221 AD2d 674, 638 NYS2d 700 [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 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

The plaintiff, in order to rebut a prima facie showing of entitlement by the defendant to an order granting summary judgment, 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 plaintiff's injuries (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 (002), the defendants Zelenetz, and Nassau Infectious Diseases have submitted, *inter alia*, an attorney's affirmation; the affidavit of defendants' expert Bruce Farber, M.D.(hereinafter Farber); a copy of the summons and complaint, the moving defendants' answers, and the plaintiff's verified bill of particulars; uncertified copies of the records of Syosset Hospital, Island Orthopaedic, the Smithtown Radiology record, dated April 25, 2007, Long Island Jewish Medical Center, and Hospital for Special Surgery; a certified copy of the Plainview Hospital record; and the unsigned but certified copies of the transcripts of the examination before trial (hereinafter EBT) of Abulencia, dated July 28, 2010, and the plaintiff, dated March 11, 2010. The aforementioned unsigned but certified copies of the EBTs are not objected to by the plaintiff and are considered herein (see **Zalot v Zieba**, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). The plaintiff does not oppose this motion or otherwise raise a factual issue to preclude summary judgment.

In his affidavit, Farber avers that he is a physician licensed to practice medicine in New York, is Board Certified in infectious disease and is familiar with treating patients with post-operative orthopedic infections. Farber sets forth the records and material which he reviewed and opines with a reasonable degree of medical certainty that Zelenetz and Nassau Infectious Diseases did not depart from the good and accepted standards of care for infectious disease that may have caused any injury to the plaintiff during his admission at Plainview Hospital from April 3, 2007 through April 5, 2007.

Farber further state that the plaintiff was admitted to Plainview Hospital on the aforementioned dates by the orthopedist Ticker due to an infection at the site of the orthopedic pins which had been inserted by Abulencia as part of an external fixation device placed on the plaintiff during surgery for a shattered right tibia/fibula in January 2007. Upon arrival at Plainview Hospital emergency room on April 3, 2007, the plaintiff presented with some greenish drainage from one of the pin sites. The drainage was cultured, blood cultures were drawn, and other laboratory tests were conducted to determine, *inter alia*, whether the plaintiff had a systemic infection. Ticker requested an infectious disease consult with Zelenetz who determined that the external fixation device had been treated twice before for an infection at the pin site, and that this current episode started about a week prior, with increasing redness at the pin site despite the fact that the plaintiff was taking the antibiotic Duricef. Zelenetz found that the plaintiff had swelling in his right leg below the knee with erythema (redness) particularly around the pin sites, with significant pain upon palpation of the area. Zelenetz noted that some outpatient imaging studies showed that there was some concern for osteomyelitis (bone infection) around the pin site, and documented, that if this was so, the only way to treat the condition would be to remove the pins as the antibiotic could not penetrate a foreign body to eradicate the infection.

Farber opines that Zelenetz formulated an appropriate treatment plan with intravenous antibiotics during the plaintiff's hospitalization, ruled out a systemic infection, continued oral antibiotics upon discharge and ordered blood and wound cultures. Farber further states that the antibiotic, Vancomycin, was an excellent choice to effectively treat the infection which was identified as staph aureus. The oral medication Minocycline ordered upon the plaintiff's discharge home was also effective for treating the staph aureus. Blood tests and cultures continued to be monitored, and x-rays showed no evidence of osteomyelitis or systemic

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infection. Farber opines that the plaintiff never developed an osteomyelitis, which was ruled out by CT scans taken at Smithtown Radiology on April 25, 2007 and May 30, 2007, a bone marrow scan taken at the Division of Nuclear Medicine at Long Island Jewish Medical Center on May 9, 2007, and the operative report relative to the pin removal on July 2, 2007. Farber further opines that all testing was timely ordered, conducted, and interpreted, that the patient improved under Zelenetz's care and treatment, and that he was discharged by Zelenetz back to his treating orthopedist. Farber states the basis for his opinion that all the conditions which the plaintiff presented to Plainview Hospital were properly and timely treated.

As to the issue of informed consent, Farber states that Zelenetz was not deposed, but that the risk of not instituting antibiotic therapy posed a grave hazard and presented minimal risks, which a reasonably prudent person in the plaintiff's position would not have undergone unless he had been fully informed of the risks. Further, Farber states that none of the claimed departures by Zelenetz was the proximate cause of the plaintiff's claimed injuries.

The Court finds that Paul D. Zelenetz and Nassau Infectious Diseases, PLLC have established summary judgment dismissing the complaint as asserted against them, and no opposition has been submitted by the plaintiff.

Accordingly, motion (002) is granted and the plaintiff's complaint asserted against Zelenetz and Nassau Infectious Diseases is dismissed with prejudice.

In motion (003), the defendants Syosset Hospital, North Shore Long Island Jewish and Plainview Hospital seek summary judgment dismissing the complaint. They support this application with, *inter alia*, an attorney's affirmation, the affirmations of their expert witnesses Philip A. Robbins, M.D. (hereinafter Robbins) and Salvatore Scoma, M.D. (hereinafter Scoma); copies of the summons and complaint, the answer served by Syosset Hospital, and North Shore Long Island Jewish and the answer served by Plainview Hospital, and plaintiff's verified bills of particulars as to Syosset Hospital, Plainview Hospital, and North Shore Long Island Jewish; copies of Abulencia's uncertified and unsigned EBT transcripts, dated July 28, 2010, and the plaintiff, dated March 11, 2010 and continued on April 9, 2010, which transcripts are not in admissible form (see **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]), and are not accompanied by an affidavit or proof of service pursuant to CPLR §3116; and the continued transcript, which additionally fails to comport with CPLR §2101 (a); certified copies of Syosset Hospital record and Plainview Hospital record; and Abulencia's uncertified medical records.

In his affirmation, Robbins states that he is a physician licensed to practice medicine in New York and is Board Certified in orthopedic surgery. He states that he is fully familiar with the standard of care for orthopedic surgery as it existed in January 2007 through May 2007, and sets forth the records and materials which he reviewed. He opines within a reasonable degree of medical certainty that the care and treatment rendered at Syosset Hospital and Plainview Hospital was in accord with appropriate standards of care, and did not, either by act or omission, cause, contribute to, aggravate, or exacerbate, the condition of the plaintiff's right lower extremity, with particular regard to the comminuted pilon fracture of the distal tibia.

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Robbins further opines that from January 26, 2007, Syosset Hospital, through its agents, appropriately evaluated, monitored, documented, and communicated the plaintiff's condition to Abulencia who was responsible for the open reduction, internal fixation and external fixation, as well as the post-surgical course, and that Syosset Hospital carried out Abulencia's orders within the required standard of care. Robbins adds that no agent from Syosset Hospital caused, contributed, or aggravated the plaintiff's claimed injuries. He notes that Abulencia discussed the risks, benefits, and alternatives with the plaintiff, including persistent pain, stiffness, weakness, infection, wound problems, early osteoarthritis and the need for more surgery. Robbins notes that the plaintiff understood this information and signed a consent form for the procedure. Robbins describes the surgical procedure for the open reduction internal and external fixation procedure, that he confirmed satisfactory reduction of the fracture fragments, and satisfactory placement of the hardware via fluoroscopy. Thereafter, the plaintiff received antibiotics and pain medication, and was discharged home by Abulencia, with appropriate discharge orders and instruction.

Robbins states that the plaintiff continued to treat with Abulencia at Island Orthopaedics. On February 5, 2007, the plaintiff presented to Abulencia with complaints of pain in both ankles after having fallen in the bathtub. On February 12, 2007, the plaintiff's right ankle was noted to have healed with no signs of infection. However, on February 22, 2007, Abulencia noted that the plaintiff had erythema or redness around the proximal pin site, for which he prescribed the antibiotic Duricef, and ordered appropriate skin care. Abulencia noted, on February 23, 2007, slight serous drainage and, on March 5, 2007, he cleaned the pin sites and noted that there was less swelling and no drainage and antibiotics were to be continued. He noted that the pin sites were clean on March 12, 2007 and March 21, 2007. Robbins states that because Abulencia was out of the country on April 3, 2007, the plaintiff treated with Ticker at Island Orthopaedics for complaints of fever, chills and pain in his right ankle. Ticker noted some crusting and scant evidence of discharge medially at the calcaneus, and admitted the plaintiff to Plainview Hospital for intravenous antibiotics and an infectious disease consult with Zelenetz. A CT scan of the right tibia and fibula, on April 3, 2007, revealed "no radiographic evidence of osteomyelitis." Robbins further states that Abraham noted on April 4, 2007 that the plaintiff advised him that he was not compliant with oral, physician-ordered antibiotics. The plaintiff followed up with Abulencia on April 9, 2007, following his discharge from Plainview Hospital on April 5, 2007, and was noted as having improved right ankle pain and clean pin sites.

Robbins further opines that from April 3, 2007 through April 5, 2007, the employees of Plainview Hospital followed all directives and orders given by Ticker, the plaintiff's private admitting physician, properly administered medications and all diagnostic tests and consultations, and appropriately documented his progress. Thus, Robbins concludes that Plainview Hospital, by its employees, did not cause or contribute to any of the plaintiff's alleged injuries.

In his affirmation, Scoma states that he is a physician license to practice medicine in New York and affirms that he is Board Certified in infectious disease. He states that he is familiar with the standard of care for infectious disease as it existed from January 2007 through May 2007, with regard to examining, diagnosing, and treating post-operative wound infections, specifically pin site infections and cellulitis. He sets forth the records and materials

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which he reviewed and opines with a reasonable degree of medical certainty that Syosset Hospital and Plainview Hospital, and their agents, rendered care and treatment to the plaintiff that was in accord with appropriate standards of care, and that they did not, either by act or omission, cause, contribute to, aggravate, or exacerbate the condition of the plaintiff's right lower extremity, particularly with regard to the comminuted pilon fracture of the distal tibia.

As to Syosset Hospital, Scoma states that its agents appropriately evaluated, monitored, documented, and communicated the plaintiff's condition to Abulencia, who was responsible for the open reduction, internal fixation and external fixation, as well as the post-surgical care. Scoma states that there was no sign of infection and that the plaintiff appropriately received applicable operative antibiotics, and that any allegations regarding the sterile field and equipment are completely without support.

As to Plainview Hospital, Scoma states that its employees followed all directives and orders given by Ticker, the plaintiff's private physician and that all medications were appropriately administered, all diagnostic tests and consultations were timely and properly conducted, and the plaintiff's progress was appropriately documented. Scoma continues that the plaintiff never developed any radiologic or clinical signs of osteomyelitis, and any alleged pin tract infection was appropriately treated with antibiotics and was resolved, despite the plaintiff's documented non-compliance and relentless smoking of two packs of cigarettes per day. Scoma further states that Ticker was the plaintiff's private attending physician and was responsible for any and all treatment plans and decisions regarding the plaintiff's care and treatment, and that Plainview Hospital's role was limited to executing Ticker's orders. Scoma does not offer an opinion with regard to the propriety of Ticker's care.

Based upon the foregoing, the Court finds that Syosset Hospital and Plainview Hospital and North Shore Long Island Jewish have established prima facie entitlement to summary judgment dismissing the complaint.

The plaintiff opposes motion (003) as it relates to the defendants Syosset Hospital and North Shore Long Island Jewish because they are vicariously liable for the negligent acts of the defendant Abulencia. In support of this claim, the plaintiff has submitted an attorney's affirmation; the affidavit of the plaintiff's expert physician¹; and Abulencia's signed and certified EBT transcript.

In his affidavit, the plaintiff's expert avers that he is a physician licensed to practice medicine in New York, New Jersey, Pennsylvania, and Florida and is Board Certified in orthopedic surgery. The plaintiff's expert set forth that he is familiar with the evaluation, diagnosis, and treatment of patients who have suffered comminuted tibia fractures, non-union of a fracture, need for revision surgery, post-operative cellulitis, infection and complex regional pain syndrome/reflex sympathetic dystrophy. He states the plaintiff's history of his injury, his

¹The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name and State and notary. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

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various hospitalizations, treatment by his attending physicians, and directs his opinions with a reasonable degree of medical certainty to the care and treatment by Abulencia while the plaintiff was a patient at Syosset Hospital from January 26 through 29, 2007. He states that on January 26, 2007, there was a closed fracture of the right tibia. He also states that once the decision was made by Abulencia to perform an open reduction, he had an obligation to substantially reduce and fix the fragments of the comminuted fracture, and that Abulencia failed to do so.

The plaintiff's expert continues that on post-operative day one, the plaintiff felt the fracture move. Later x-rays revealed there was a non-union of the fracture, which plaintiff's expert states is the expected result of an inadequately reduced and inadequate fixated fracture. The plaintiff's expert continues that Abulencia used improper screws during the surgery of January 27, 2007 as they were too short to hold the reduction, which is a departure from the accepted standards of orthopedic care, and which caused the inadequate reduction and subsequent non-union. He states that the plaintiff suffered from tarsal tunnel syndrome related to the insertion and placement of one calcaneal pin, and that two calcaneal pins would have been better to more evenly distribute the forces. He concludes that the plaintiff was subsequently diagnosed with reflex sympathetic dystrophy, a nerve disorder characterized by chronic severe burning pain, increased skin sensitivity, swelling and stiffness of the affected joint, and motor disability, all a consequence of the initial surgery performed on January 27, 2007. He concludes that such departures were substantial contributing factors in causing the injuries suffered by the plaintiff.

Based upon the foregoing, the plaintiff has failed to raise a triable issue of fact precluding the granting of summary judgment to Syosset Hospital and North Shore Long Island Jewish. While a hospital can be held concurrently liable with a physician if one of its employees committed independent acts of negligence, or the physician's orders were contraindicated by normal practice and while, in general, a hospital cannot be held vicariously liable for the negligence of a private attending physician (*Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010; *Martinez v LaPorta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]), the plaintiff's expert opinions do not conclude that there were any departures by the hospitals or their employees which proximately caused or contributed to the plaintiff's injuries. At his EBT, Abulencia testified that he chose the type of screws and fixators and calcaneal pin used during the surgery. He was not an employee of either hospital so as to render them vicariously liable for his actions and claimed departures from the standards of orthopedic care. Abulencia testified that he had admitting privileges at Syosset Hospital and Plainview Hospital in 2007, and was employed by Island Orthopaedics in January 2007, and by Empire Stat Medical Review to perform independent medical examinations for Worker's Compensation and no-fault. As to the issue of informed consent, the plaintiff's expert does not opine that there were any departures by the staff of either hospital, and states that it is the physician's responsibility to provide informed consent to the plaintiff (*Sela v Katz*, *supra*). The plaintiff has failed to raise a factual issue to preclude summary judgment to the defendant hospitals, or North Shore Long Island Jewish, on either the issues of liability, lack of informed consent, or negligent hiring.

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Accordingly, motion (003) is granted and the complaint asserted against North Shore University Hospital d/b/a Syosset Hospital and North Shore Long Island Jewish Health Systems, Inc. s/h/a North Shore Long Island Jewish Health System and Plainview Hospital is dismissed with prejudice.

In motion (004), the defendants Island Orthopedics, Abraham, Ticker, and Lippe seek summary judgment dismissing the complaint as asserted against them and, in support, have submitted, *inter alia*, an attorney's affirmation; the expert affirmation of Stephen H. Marcus, M.D. (hereinafter Marcus); a copy of the summons and complaint, answers, and plaintiff's verified bill of particulars; the unsigned but certified copy of the plaintiff's EBT transcript, dated March 11, 2010, which is not objected to by the plaintiff and is considered (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); a signed and certified copy of Abulencia's EBT transcript, dated July 28, 2010; and certified copies of the records of Syosset Hospital and Plainview Hospital records, and Abulencia's office records. The plaintiff does not oppose the motion for summary judgment submitted by the moving defendants Island Orthopaedics, Abraham, Ticker, and Lippe.

At his EBT, Abulencia testified that he is licensed to practice medicine in New York and is Board Certified in orthopedic surgery. He had admitting privileges at Syosset Hospital and Plainview Hospital in 2007. He was last employed by Island Orthopedics on May 31, 2007, and considered himself a partner with Lippe, Ticker and Douglas Barkin. They had an affiliation with Queens-Long Island Medical Group in January, 2007, and he saw patients once every one or two weeks in one of their Ronkonkoma facilities. Abulencia first saw the plaintiff at Syosset Hospital on January 26, 2007, having been informed by the emergency department staff that the plaintiff was a patient there. He saw the plaintiff at Syosset Hospital and conducted a focused orthopedic examination of his right ankle and a review of the radiological studies. He determined that there was a tibial pilon fracture of the plaintiff's right leg, which presented as a comminuted fracture of his right ankle wherein the bone was shattered.

Abulencia testified that he recommended external fixation and open reduction with internal fixation of the right ankle, and apprised the plaintiff of the risks, benefits, and alternatives, including, but not limited to persistent pain, stiffness, weakness, infection, neurovascular injury, wound problems, DVT/PE/death, early osteoarthritis, and the need for more surgery, and stated that the plaintiff understood and consented. The following day, assisted by Abraham, he performed the orthopedic surgery on the plaintiff. He testified that he made the ultimate decisions concerning the surgery performed, the size and number and type of pins and screws, and the external fixator which were employed during surgery. He described the procedure, the use of medications including antibiotics, and the equipment used, in conjunction with a live fluoroscopy to make the fracture as well aligned as possible, and to determine the proper placement and affixation of the internal fixators.

Abulencia thereafter described the post-operative care and treatment, including use of antibiotics. On January 31, 2007, he noted sanguinous drainage from one of the incisions on the anterior aspect of the ankle, which he described as bloody, and which he did not culture. He stated that there were no signs of infection, however. At the February 20, 2007 office visit, he noted that the plaintiff had a slight erythema (redness) around the proximal pin site, without

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drainage. The plaintiff's right ankle was x-rayed, he was instructed in peroxide pin care, and his calf was checked for compartment syndrome. Abulencia considered osteonecrosis (bone death) and ordered Medrol dose pack to reduce inflammation. The compartments in the plaintiff's leg were soft, the redness around the pin was noted to be fading, but there was slight serous drainage noted on February 23, 2007. Abulencia did not order any testing or culture the drainage. Pin removal was discussed with the plaintiff and antibiotics which the plaintiff had been taking, were continued.

Abulencia further testified that on March 5, 2007, based upon the x-rays, he felt that it might be necessary for the plaintiff to have a revision reduction internal fixation with external fixation of the right ankle due to the persistence of one of the fracture lines, and that there was also possible fracture fragments near the joint space. Because this was roughly six weeks post-operative, it was premature to label this as a non-union. There was also consideration of a fusion of the ankle due to the plaintiff's pain, the multiple fragments and uneven joint space. There was no serous drainage noted, and nearly no erythema. On March 21, 2007, he made reference to the plaintiff having a temporary total disability, which he thought was relating to Workers' Compensation. On March 28, 2007, tenderness and redness around the pin site were noted, which Abulencia stated was consistent with a pin site infection and which he was treating with Duricef, an appropriate antibiotic for this condition. On April 3, 2007, because Abulencia was away on vacation, Ticker admitted the plaintiff to Plainview Hospital for intravenous antibiotic treatment of an infection at the site.

In his affirmation, Marcus states that he is licensed to practice medicine in New York, and is Board Certified in orthopedic surgery. He sets forth the materials and records which he reviewed, and he opines with a reasonable degree of medical certainty that Abraham, Ticker, and Lippe, did not deviate from accepted standards of care with regard to their respective care and treatment of the plaintiff. He states that they each had a very limited role in the plaintiff's treatment, and did not proximately cause any of the plaintiff's claimed injuries.

Marcus continues that Abraham did not make any decisions as to the surgery, or equipment used during it, while assisting Abulencia on January 26, 2007, and that he acted within good and accepted practice, and that nothing he did or did not do resulted in any injury or exacerbation of the plaintiff's injury. Informed consent was obtained by Abulencia. On April 4, 2007, when Abraham examined the plaintiff, the care and treatment was within standards of care and did not cause or exacerbate any injury to the plaintiff.

Marcus further states that on April 3, 2007, three months after surgery, Ticker examined the plaintiff, and due to his concern about infection, properly referred the plaintiff to Plainview Hospital, ordered an infectious disease consult and discharged the plaintiff after appropriate antibiotics were administered intravenously. Marcus states that Ticker appropriately rendered care and treatment to the plaintiff and did not depart from good and accepted standards of care and treatment, and did not do, or fail to do, anything which proximately caused or exacerbated injury to the plaintiff.

Marcus further states that on April 13, 2007, when Lippe examined and treated the plaintiff at Island Orthopaedics, he noted that the plaintiff may have developed reflex sympathetic dystrophy syndrome, so Lippe suggested a pain management consultation,

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prescribed medication to address the plaintiff's complaints of pain, and advised the plaintiff to follow with Abulencia in one week. Marcus opines that the care and treatment rendered by Lippe was in accord with good and accepted practice, and that he did not cause or contribute to any injury to the plaintiff.

Based upon the foregoing, the Court finds that the moving defendants have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them. The plaintiff has not opposed this application and has not raised factual issue to preclude summary judgment.

Accordingly, motion (004) is granted and the plaintiff's complaint is dismissed with prejudice as asserted against Island Orthopaedics & Sports Medicine, P.C., Richard Abraham, P.A., Jonathan B. Ticker, M.D., and Robert J. Lippe, M.D.

Armand E. Abulencia, M.D. has not moved for summary judgment and is the only defendant remaining in this action.

Dated: _____

FEB 15 2012



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION