SHORT FORM ORDER

INDEX No. 09-41683
CAL. No. 11-02089MM

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

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-1-12
ADJ. DATE 3-15-12
Mot. Seq. # 001 - MG

THERESA CHRISTENSEN, Plaintiff, - against - ARAIN M. NAWAZ, M.D., AZIZ CHAUDRY, M.D., and STEVEN PELAEZ, M.D., Defendants.	BIRZON, STRANG & ASSOCIATES Attorney for Plaintiff 22 East Main Street, Suite 212 Smithtown, New York 11787 LEWIS JOHS AVALLONE AVILES, LLP Attorney for Defendant Nawaz 425 Broad Hollow Road, Suite 400 Melville, New York 11747 SANTANGELO, BENVENUTO & SLATTERY Attorney for Defendant Chaudry 1800 Northern Boulevard Roslyn, New York 11576 LAWRENCE, WORDEN, RAINIS & BARD, P.C. Attorney for Defendant Pelaez 225 Broad Hollow Road, Suite 120 Melville, New York 11747

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 12; Notice of Cross Motion and supporting papers ___; 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 this unopposed motion by the defendant Steven Pelaez, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted with prejudice.

In this medical malpractice action, the plaintiff, Theresa Christiansen, alleges that the defendants negligently departed from accepted standards of care and treatment from October 23, 2008 to November 17, 2008, during her admission to Mather Memorial Hospital. It is alleged that defendants failed to order a CT scan of the abdomen or perform a colonoscopy, misdiagnosing that the ulcerative colitis from which she suffered was limited to the sigmoid and descending colon. The plaintiff further alleges that as a result of the departures from accepted standards of care, she was caused to suffer an escalation and degeneration of the colonic illness to toxic megacolon; multiple spontaneous perforations of the colon secondary to undiagnosed toxic megacolon; peritonitis

and spillage of colon contents; bacteremia; pulmonary embolism; deep venous thrombosis; systemic coagulopathy requiring anticoagulant therapy; bilateral hypronephrosis; abdominal colectomy and ileostomy; acute and severe conscious pain and suffering; loss of enjoyment of life; and prolonged debilitation.

Steven Pelaez, M.D. seeks summary judgment dismissing the complaint as asserted against him on the bases that he saw the plaintiff on only one occasion on October 30, 2008 on consultation; at the time of that consultation, the plaintiff was not a surgical candidate; there were no signs of any escalating colonic disease warranting emergent surgical intervention; that her condition was improving; that she had no signs or symptoms of an acute process requiring immediate surgery; and that he did not depart from accepted standards of care, or proximately cause the injuries claimed in this action.

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 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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,*** 221 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 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

In support of the instant application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answer served by defendant Pelaez, and plaintiff's verified bill of particulars; the unsigned but certified copy of the transcripts of the examinations before trial of Theresa Christensen dated June 28, 2010, non-party witness Jaime Wicks dated August 26, 2010, Arain M. Nawaz, M.D. dated January 14, 2011, and Steven Pelaez, M.D. dated September 15, 2011; the unsigned and uncertified transcript of the examination before trial of Aziz Chaudry, M.D. dated June 17, 2011; an uncertified copy of the plaintiff's admission record at Mather T. Memorial Hospital commencing October 23, 2008; and the affirmation of Robert D. Turoff, M.D.

The unsigned but certified copies of the deposition transcripts, of the parties as set forth above, are considered herein (***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). However, the unsigned transcripts of the non-party witnesses are not in admissible form and are not considered as the moving defendant has not submitted an affidavit or proof of service of the same pursuant to CPLR 3116, or that a copy of this motion was served upon them (*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]). The uncertified copy of the decedent's medical record is not in admissible form as required pursuant to CPLR 3212 (***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]).

Arain M. Nawaz, M.D. testified to the extent that he is board certified in internal medicine and gastroenterology. He stated that Theresa Christiansen was referred to him by Dr. Consigliere for a gastroenterology consult. He took a history and examined her, then performed a colonoscopy on January 18, 2002, which revealed that she had ulcerative colitis, patchy and limited to the left colon and rectum, with some changes in the cecum. He set forth her care and treatment over the next several years. On February 25, 2008, she had a colonoscopy which revealed a benign colonic mucosa with acute inflammation of the lamina propria, with detached fragment of crushed, likely fibrinopurulent exudate. The findings, he stated, indicated an essentially good test. Thereafter, she experienced some flare-ups for which her Prednisone was intermittently increased and extra iron and vitamins were ordered. He continued that the plaintiff was admitted to Mather Hospital on October 23, 2008, by Dr. Chaudry, for an acute flare-up of ulcerative colitis and the failure to respond to oral steroids. He planned on administering intravenous steroids, and Protonix to minimize the risk of GI upset or stress ulcers. Antibiotics were started. Dr. Nawaz continued that an x-ray showed inflammation of the left side of the colon, and there was no clinical suspicion for mega colon. A limited colonoscopy was performed for the purpose of viewing the general gross appearance of the bowel. This was done without a bowel prep as a prep could exacerbate her condition. The colonoscopy revealed severe ulcerative colitis with polyp formation involving the rectum, sigmoid colon, and distal half of the descending colon. It was intentional not to advance the scope to the splenic flexure. A biopsy taken at the time revealed severe ulcerative colitis of the left colon.

Dr. Nawaz testified that on October 30, 2008, his consult note indicated that the plaintiff was feeling better, cramps decreased, there was no bleeding, her abdomen was soft, nondistended, that she was becoming Cushingoid, or showing effects from the steroids, and he would continue the present treatment. Thereafter, he called in Dr. Pelaez on surgical consult. When Dr. Nawaz saw the plaintiff on October 31, 2008, she was feeling better, had no bleeding, no fever, had a small bowel movement, and minimal tenderness in the left lower quadrant. Again, on November 2, 2008, she was noted to be clinically better. On November 3, 2008, he planned to discharge her from the hospital within 24 - 48 hours, after clearance from cardiology. However, on November 5, 2008, she experienced loose stools with bleeding which necessitated a transfusion. She remained clinically ill over the next several days. On November 11, 2008, she had no clinical signs of toxic mega colon or bowel perforation. On November 17, 2008, his impression was that the ulcerative colitis was confined to the left colon and sigmoid, and that she then had diffuse disease of the colon. Dr. Nawaz testified that there was no specific reason to do a CT scan of the abdomen during this admission. He further testified that during this admission, the plaintiff did not exhibit any signs of bowel perforation or coagulopathy.

Dr. Pelaez testified to the extent that he is board certified in colorectal surgery. He has been involved in the care and treatment of patients who have had ulcerative colitis and toxic mega colon. He considers the treatment of toxic mega colon an emergency. Dr. Nawaz asked him to see the plaintiff on consultation during her admission to Mather Hospital. He testified that he saw her on consult on October 30, 2008 for her admission for bloody diarrhea, weight loss, and abdominal pain. She had a colonoscopy on October 29, 2008, limited to the proximal descending colon, which showed severe ulcerative colitis involving the rectum to the distal descending colon. He testified that he could not conclude if the colitis involved more of the proximal colon. If it did, it doesn't necessarily mean that treatment would be changed. He obtained the plaintiff's medical history. Physical examination revealed that her abdomen was soft, bowel sounds stable, she was in no acute distress, had no guarding, tenderness or peritoneal signs, and her abdomen was mildly distended. He assessed her laboratory blood work which was essentially normal, except that her hemoglobin was slightly low, which is not uncommon for someone with colitis. His impression was that of exacerbation of ulcerative colitis involving the rectum to the descending colon, and that she appeared to be clinically improving. He recommended continuing with medical management. He did not feel that a CT scan would have offered him any additional information which would change the treatment plan. Dr. Pelaez further testified that the plaintiff was not an acute surgical candidate warranting emergency surgery when he saw her on consult on October 30, 2008. He did not feel there was any indication to take her to the operating room on that date. She showed no signs of toxicity, she had no fever, her white blood count was normal, her abdomen was soft, and she did not show any signs of guarding or other pertinent signs. He was not asked to see the plaintiff again after that consult.

Theresa Christensen testified to the effect that when Dr. Pelaez saw her on surgical consult on October 30, 2008, he advised her that he did not think surgery was necessary as she had been started on various medications. She did not ask him any questions.

Robert D. Turoff, M.D., the moving defendant's expert physician, affirms that he is a physician licensed to practice medicine in New York and is board certified in general surgery. He set forth that he reviewed the pleadings, the bill of particulars, the medical and hospital records, and the deposition testimonies. Dr. Turoff opined that when Steven Pelaez, M.D saw the plaintiff on surgical consultation on October 30, 2009, he did not depart from accepted medical practice, that his treatment recommendation was appropriate and did not cause the injuries alleged by the plaintiff. Dr. Turoff opined that it was not a departure from the standard of care for Dr. Pelaez to rely upon the October 29, 2008 colonoscopy and abdominal films of October 25 and 28, 2008, in rendering his opinion as to whether or not the plaintiff presented with an acute surgical condition on October 30, 2008. He further opined that it was not a departure not to order a CT scan on October 30, 2008 as there was no medical indication for the invasive test which would have no diagnostic purpose in that the plaintiff's condition was improving. He further opined that Dr. Pelaez did not misinterpret the clinical data available to him, and he did not fail to diagnose the extent of the plaintiff's colonic disease.

Dr. Turoff stated that the data available to Dr. Pelaez at the time of consultation confirmed that the plaintiff had a severe ulcerative colitis condition and that the management of the diffuse disease was appropriate and effective. He set forth the plaintiff's history, her care and treatment, results of the diagnostic testings, including pathology, radiographic, and blood tests. After the plaintiff was seen by Dr. Pelaez, the plaintiff's condition was found to be improving. She stated she was feeling better. She had no bleeding and no fever. Her clinical signs and symptoms showed she was improving. On November 1 through 3, 2008, the plaintiff denied any abdominal pain, had a good appetite, and was ambulating without assistance with a steady gait. It was not until November

6, 2008, that the plaintiff's clinical presentation changed and there was a deterioration of her overall condition. Dr. Pelaez was not called back to see the plaintiff, and instead, a gastroenterologist, Dr. Ali Kara Karum was called. Thus, opined Dr. Turoff, the plaintiff was not a surgical candidate on October 30, 2008 when he saw her.

Dr. Turoff continued that on October 30, 2008, the plaintiff did not present with any signs of escalating colonic condition that would have warranted immediate surgical intervention on that date, and the colonoscopy, radiology studies, and laboratory tests results all supported that she was not a surgical candidate. The plaintiff's condition was improving, she was receiving medical management of her ulcerative colitis, and she was treated with Prednisone and oral Asacol. Her abdomen was benign, soft with no guarding or tenderness, and she had no peritoneal signs. He continued that even if a CT scan revealed more extensive disease beyond the descending colon, the treatment of the diffuse ulcerative colitis would have been the same, with steroids and anti-inflammatory medications being administered. He set forth the medical management and care and treatment for ulcerative colitis. In conclusion, Dr. Turoff opined that Dr. Pelaez did not depart from accepted medical practice and did not proximately cause the injuries alleged by the plaintiff.

Based upon the foregoing, it is determined that Steven Pelaez, M.D. has established prima facie entitlement to summary judgment dismissing the complaint on the bases that he did not depart from accepted standards of care and treatment and did not proximately cause or contribute to the plaintiff's alleged injuries.

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]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (***Bengston v Wang,*** 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *see, also,* ***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]; ***Halkias v Otolaryngology-Facial Plastic Surgery Assoc.***, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). Here, the plaintiff has not opposed the instant application and has thus failed to raise a triable factual issue to preclude summary judgment.

Accordingly, the motion is granted and the complaint as asserted against Steven Pelaez, M.D. is dismissed with prejudice.

Dated: May 23, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION