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SHORT FORM ORDER

INDEX No. 10-25709
CAL No. 11-01135MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 10-28-11
ADJ. DATE 3-13-12
Mot. Seq. # 001 - MD

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DANIEL M. MAHONY, as Administrator of the goods, chattels, and credits of DANIEL J. MAHONY, deceased, and DANIEL M. MAHONY, Individually,

Plaintiffs,

- against -

ZWANGER & PESIRI RADIOLOGY GROUP, LLP,

Defendant.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1- 16; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17-23; Replying Affidavits and supporting papers 24-28; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Zwanger & Pesiri Radiology Group, LLP, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

In this action, claims for ordinary negligence and for medical malpractice have been interposed arising out of a fall suffered by the plaintiff's decedent, Daniel J. Mahony, on July 15, 2009, at the premises of the defendant, Zwanger & Pesiri Radiology Group, LLP (Zwanger & Pesiri), located at 1729 North Ocean Avenue, Medford, New York. The plaintiff's decedent, who used a walker to assist with ambulating, was at defendant's premises to have an MRI performed. It is alleged that the decedent's walker was pulled into the magnetic field generated by the MRI machine, causing him to fall and suffer serious physical injury, including a cerebral vascular bleed. As a result of the injuries alleged to have been sustained by the decedent, he was confined thereafter to Brookhaven Hospital, Stony Brook Hospital, St. Charles Hospital, and the Northport Veteran's Hospital from July 15, 2009 until his death on September 15, 2009. On May 26, 2010, letters of administration were granted to Daniel M. Mahoney by the Surrogate's Court, Suffolk County, and the instant action was thereafter commenced against Zwanger & Pesiri.

Zwanger & Pesiri now seeks summary judgment dismissing the complaint on the bases that it did not proximately cause the decedent to suffer a stroke; the decedent had multiple risk factors for a stroke; the type of stroke suffered by the decedent was due to a blood clot and not due to a trauma; although instructed to wait at the door of the MRI room, the decedent walked into the room with his walker which then caused the walker to be drawn to the magnetic field causing him to fall; and it had no duty to warn the decedent of an open and obvious condition which is not inherently dangerous.

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, defendant's answer and various discovery demands, and plaintiff's verified bill of particulars; the transcript of the examination before trial of Daniel M. Mahony dated January 20, 2011, with proof of service upon counsel pursuant to CPLR 3116; the transcripts of the examinations before trial of Shara Cannizzo dated April 4, 2011, and Carlos Rivera dated April 4, 2011; a copy of an incident report; uncertified copies of the Brookhaven Hospital record and South Shore Neurology; and the affirmations of Richard N. Silvergleid, M.D. and Howard Reiser, M.D.

Dr. Silvergleid and Dr. Reiser have affirmed that they reviewed the decedent's medical records from Brookhaven Memorial Hospital Medical Center, Stony Brook University Medical Center, and St. Charles Hospital, however, the records from Stony Brook University Medical Center, and St. Charles Hospital have not been submitted with the moving papers. Dr. Reiser additionally affirmed that he reviewed the decedent's medical records from the Long Island State Veterans Home, as well as the Department of Veteran's Affairs Medical Center in Northport, which records have not been submitted either. The uncertified copies of the decedent's medical records are 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]; ***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]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

It is determined that even if the medical records submitted were in admissible form, and all the supporting medical records had been provided, that the defendant has not demonstrated prima facie entitlement to summary judgment as there are factual issues which preclude the same.

Richard N. Silvergleid, M.D., defendant's expert, affirms that he is licensed to practice medicine in New York and is board certified in diagnostic radiology with a certificate in neuroradiology. In connection with the preparation of his affirmation, he stated that he conducted a thorough radiological review of the file and radiological studies. He reviewed the CT studies of the head taken July 17, 2009, July 18, 2009, and July 22, 2009; a CT angiogram of the neck and carotid arteries from July 21, 2009; a carotid ultrasound from July 18, 2009; a CT of the spine from July 22, 2009; and a chest x-ray of July 17, 2009, from Brookhaven Memorial Hospital Medical Center. He reviewed the studies and accompanying reports for a CT angiogram of the head and neck of July 24, 2009; a CT of the head from July 28, 2009; a CT angiogram of the head from July 29, 2009; various chest x-rays from July 24, 2009, July 29, 2009, July 30, 2009, September 3, 2009, and September 7, 2009 from Stony Brook University Medical Center. He reviewed the studies and accompanying reports for a chest x-ray from August 17, 2009; a bilateral carotid ultrasound from August 25, 2009; and an ultrasound of the bilateral legs with doppler from August 25, 2009 from St. Charles Hospital.

From his review of the studies, Dr. Silvergleid affirms with a reasonable degree of medical certainty that the stroke suffered by Daniel J. Mahony was not caused by the fall sustained at Zwanger Pesiri Radiology Group on July 15, 2009, because his stroke was not traumatic in nature. He continues, that contrary to the plaintiff's allegations, the decedent did not suffer from a cerebral vascular bleed, and there is no evidence of a vascular bleed on any of the radiology studies reviewed, including those from Brookhaven Memorial Hospital Center, where Mr. Mahony was diagnosed and treated for his stroke. He further adds that there was no evidence of traumatic injury to the head, or any of the vessels within the head, contained on any of the radiological studies reviewed, which studies would have shown evidence of trauma if such injuries existed. There were no skull fractures and no evidence of any hemorrhage in any of the studies which could be indicative of trauma to the brain.

Dr. Silvergleid continues that at Brookhaven Hospital, Mr. Mahoney was diagnosed with a left-sided non-hemorrhagic pontine stroke, which is a stroke in the pons, located anteriorly in the brain stem. He states that he agrees with this finding, and indicates that this type of stroke is usually associated with

hypertension, and that isolated, non-hemorrhagic pontine strokes are generally not traumatic in nature. He continues that strokes in general, are rarely caused by trauma, and that while uncommon, they can potentially occur, because trauma can cause a clot to form either within or outside of the brain, and the clot can press against surrounding tissue and vessels. This extrinsic compression of vessels due to hemorrhage or blood clot can diminish blood flow to the brain causing a stroke. Alternatively, trauma can cause a subarachnoid bleeding, which can be associated with spasm affecting blood vessels at the base of the brain. He continues that trauma can also cause a direct injury to a vessel within the brain. While all of these traumatic injuries can cause stroke in patient, he did not see any of the above traumatic findings in the radiology studies of Mr. Mahony's brain, and there is no subarachnoid hemorrhage or injury to the blood vessels supplying the brain, which would have been seen in the studies reviewed.

Dr. Silvergleid additionally states that he saw evidence of significant atherosclerotic disease with plaque formation, which is a risk factor for strokes, and that he saw an old, right, posterior cerebral infarct. He opines that the stroke suffered by Mr. Mahony was not caused by trauma from a fall, and there is no evidence in the radiological studies which can support that Mr. Mahony suffered a severe, acute, traumatic cerebral vascular bleed.

Howard B. Reiser, M.D., defendant's expert, affirms that he is licensed to practice medicine in New York State and is board certified in neurology. In connection with his affirmation, he reviewed records from South Shore Neurology Associates, Brookhaven Memorial Hospital Medical Center, Stony Brook University Medical Center, St. Charles Hospital, Long Island State Veterans Home, and the Department of Veteran's Affairs Medical Center in Northport. It is Dr. Reiser's opinion within a reasonable degree of medical certainty that the stroke suffered by Daniel J. Mahony was not caused by trauma to his head. Dr. Reiser further opines that the stroke suffered by Mr. Mahony was likely an embolus caused by atrial fibrillation in a patient who was off anticoagulants, which embolus lodged within the small vessels supplying the pons, causing the right sided symptoms. He continues that the plaintiff's decedent had many risk factors for stroke, including atrial fibrillation, extensive atherosclerotic plaque, and hypertension. In preparation for EMG/nerve conduction studies, it was recommended that the decedent stop his Coumadin about 4-5 days prior to the studies. When the decedent was admitted to Brookhaven Memorial Hospital on July 17, 2009, his INR range was at a sub-therapeutic level for a patient anticoagulated for atrial fibrillation. Dr. Reiser opines that this sub-therapeutic anticoagulation level would have increased the decedent's chances of clot development, and in addition to his hypertension and atherosclerotic disease, would have dramatically increased the probability of an ischemic stroke.

Dr. Reiser continues that the CT scan taken on July 17, 2009 at Brookhaven Hospital did not show any evidence of an intracranial bleed, nor did it show any indication of an infarction on the left side of the brain; however, an old, right, posterior cerebral infarction was noted, which had not prevented Mr. Mahony from living a normal, active life. The CT scan of July 20, 2009, demonstrated the presence of a 2.2 cm acute infarct involving the left side of the pons. He continues that an acute infarct is death of the brain tissue due to sudden insufficient blood supply which generally occurs because of a clot lodging in the vessel. He indicates that none of the reports of the radiological studies conducted on the decedent reference any evidence of trauma, nor do they contain any traumatic findings whatsoever.

Based upon the foregoing, the moving papers raise factual issues concerning whether or not the decedent sustained a trauma to his head when he fell when his metal walker became mobilized by the MRI machine, causing it to become attached to the machine. While Carlos Rivera and Shara Cannizzo testified that there was no trauma to the decedent's head, the plaintiff has testified that there was a trauma to the decedent's head, as evidenced by the red mark on his father's forehead after he fell and struck his head. Thus, the issue concerning whether or not there was a trauma to the decedent's head precludes summary judgment. Additionally, the defendant's experts have opined that trauma can cause a clot to form, and an area of clot and ischemia was evidenced in the CT scans referenced.

The plaintiff has opposed the instant motion for summary judgment with an attorney's affirmation; affidavits of the plaintiff, and his employee, Paul Bizzoco; an uncertified copy of safety manual for Magnetom Espress System; the affidavit of plaintiff's expert; and plaintiff's memorandum of law. The safety manual submitted by the plaintiff is uncertified and is not in admissible form. Moreover, it has not been established that this is the manual for the MRI machine involved in the within incident.

It is determined that Dr. Ciuffo has raised a factual issue which precludes summary judgment on the issue of proximate cause. She has opined that when head trauma is sustained, it can cause a blood clot to form in or around the brain, causing pressure on surrounding tissues and vessels, causing a diminution of blood flow to the brain. She added that a stroke may also occur in patients when trauma causes subarachnoid bleeding, and when there is a direct trauma to a vessel within the brain. It is noted that defendant's expert, Dr. Silvergleid, also opined that trauma can cause a direct injury to a vessel within the brain, and that traumatic injuries can cause a stroke in patient, although he did not see evidence of the same in the studies. Here, it has not been established in the moving papers whether or not the plaintiff suffered a head trauma which proximately caused a clot, or area of pressure on a blood vessel, to form in the blood vessel in the decedent's brain, which proximately caused him to suffer a stroke. Thus, summary judgment is precluded.

Based upon the foregoing, that branch of defendant's application which seeks summary judgment dismissing the cause of action for medical malpractice is denied.

Turning to the cause of action for negligence, the defendant asserts that it had no duty to warn the decedent of an open and obvious condition which was not inherently dangerous. However, the defendant has not established prima facie entitlement to summary judgment dismissing the cause of action premised upon the alleged negligence.

A landowner has a duty to maintain its premises in a reasonably safe manner; however, a landowner has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (***Gagliardi v Walmart Store, Inc.*** 52 AD3d 777, 860 NYS2d 207 [2d Dept 2008]; ***Salomon v Prainito***, 53 AD3d 803, 861 NYS2d 718 [2d Dept 2008]). An inherently dangerous article is one fraught with danger lying in the character and content of the article, albeit the disastrous consequences are caused immediately by an external force (***Martinez v Kaufman-Kane Realty Co, Inc.*** 74 Misc2d 341, 343 NYS2d 383 [Sup. Ct. Trial Term, Bronx County 1073]).

Where a condition is open and obvious and not inherently dangerous, there is no duty to protect or to warn against the open and obvious condition (***Hamburg v 34 East 67th Street Corp.***, 2010 NY Slip Op 32549U [Sup. Ct. New York County 2010]). Although the issue of whether a hazard is open and obvious is generally fact specific and thus a question for a jury, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence (***Hamburg v 34 East 67th Street Corp.***, supra). Although, whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, a condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff's attention is otherwise distracted (***Hamburg v 34 East 67th Street Corp.***, supra).

In order to establish prima facie entitlement to judgment as a matter of law in a premises liability case, a defendant must demonstrate that it did not create the alleged defect or have actual or constructive notice of it (***Freyman v Duane Reade, Inc.***, 24 Misc3d 1211A, 890 NYS2d 369 [Sup. Ct. Kings County 2009]).

The defendant has not submitted any evidentiary proof to demonstrate that the magnetic field, the attendant component of the MRI machine, was open and obvious, readily apparent, and not inherently dangerous, that it had no duty to warn of the condition, or that it did not cause or create the alleged condition. The defendant argues that using one's ordinary senses, the MRI machine is an open and obvious piece of diagnostic medical equipment. However, while the MRI machine is readily apparent and visible, the magnetic field cannot be visualized or appreciated with the use of one's ordinary senses. Thus, it is concluded that it is not open and obvious.

Shara Cannizzo testified that as part of her training to become an MRI technician, she was instructed concerning the safe use of the machine, including warning the patient not to wear or bring any type of metal into the MRI room. She testified that she asked the decedent whether he had a hearing aid or other metal, and he replied that he did not. However, she noted that he had a walker. Although she told the decedent and his son to wait as she entered more fully into the room to prepare for the exam, the plaintiff testified that they were not instructed to wait, and there was no mention that the walker posed a safety issue. Additionally, there were no markings on the floor or anywhere in the room warning anyone with a walker or metal equipment not to proceed.

While Shara Cannizzo and Carlos Rivera both testified that they were trained with regard to safety, it has not been demonstrated that those safety principles were complied with as the decedent was permitted to bring his walker into an area which posed danger from the invisible magnetic field. The defendant has not demonstrated that it was not negligent in failing to prevent the walker from being brought into the MRI room by the decedent, causing his walker to be propelled to the machine. Here, by the defendant's own submissions, it has been demonstrated that the MRI machine and its attendant magnetic field, which is turned on at all times, required special precautions due to the inherent danger associated with the magnetic field, and its ability to cause serious injury or death from propelling objects. Neither has the defendant demonstrated that the MRI machine and its attendant magnetic field are not inherently dangerous. The defendant had actual and constructive notice of the dangerous potential of the magnetic field for which there were safety precautions to prevent injury. Conflicting

testimony concerning whether or not the decedent was instructed to wait and enter no further into the room, precludes summary judgment in the defendant's favor.

While an MRI is an accepted medical service provided by a medical professional under a duty to perform in a manner consistent with legal and professional responsibilities, the facts in this case compel the conclusion that the MRI machine with its attendant magnetic field, was not openly obvious and that it is inherently dangerous (*see*, ***Robinson v Jewish Hospital and Medical Center of Brooklyn***, 275 AD2d 362, 712 NYS2d 585 [2d Dept 2010]). The defendant's evidentiary submissions established the need to exercise safety precautions to effectuate a safe environment for the plaintiff and others during the administration of an MRI exam. The defendant had a duty to properly warn the plaintiff of the danger and to prevent the use of the walker in the vicinity of the machine where the plaintiff and others would be put in danger from the metal object.

Based upon the foregoing, that branch of defendant's application which seeks dismissal of the first cause of action for negligence is denied.

Dated: DECEMBER 28, 2012.

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION