

Doria v Benisch

2013 NY Slip Op 32977(U)

November 18, 2013

Sup Ct, Suffolk County

Docket Number: 10-34989

Judge: Daniel Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY**PRESENT:**Hon. DANIEL MARTIN
Justice of the Supreme CourtMOTION DATE 3-19-13 (002)
MOTION DATE 6-4-13 (003 & 004)
MOTION DATE 7-9-13 (005, 006, 007)
MOTION DATE 9-3-13 (008)
ADJ. DATE 10-1-13
Mot. Seq. # 002 - MG # 006 - MD
003 - MD # 007 - MG
004 - MD # 008 - MG
005 - MG-----X
GARY DORIA and PATRICIA DORIA,

Plaintiffs,

- against -

DAVID L. BENISCH, M.D., DAVID L.
BENISCH, M.D., P.C., RAFFI BARSOUMIAN,
M.D., MELVILLE SURGERY CENTER LLC,
JOSEPH PATANE, M.D., ANDREA LESLIE
SACKNOFF, M.D., ANDREA SACKNOFF,
M.D., P.C., WEST CARVER MEDICAL
ASSOCIATES, P.C., JAY STEINBERG, M.D.,
ENDOSCOPY OBS AT HMG, PLLC,
HUNTINGTON MEDICAL GROUP, P.C. and
HUNTINGTON HOSPITAL,Defendants.
-----XDUFFY & DUFFY
Attorney for Plaintiffs
1370 RXR Plaza, West Tower, 13th Floor
Uniondale, New York 11556GERSPACH SIKOSCOW, LLP
Attorney for Defendants Benisch
40 Fulton Street, 14th Floor, Suite 1402
New York, New York 10038ROGAK & GIBBONS, LLP
Attorney for Defendant Barsoumian
50 Charles Lindbergh Boulevard, Suite 320
Uniondale, New York 11553KAUFMAN, BORGEEST & RYAN, LLP
Attorney for Defendant Melville Surgery
1205 Franklin Avenue, 2nd Floor
Garden City, New York 11530

Upon the following papers numbered 1 to 100 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 7; (003) 18-26; (004) 27-41; (005) 42-58; (006) 59-74; (007) 75-89; 0-91; Notice of Cross Motion and supporting papers (008) 92-96; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 97-98; 99-100; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) is consolidated with motions (003), (004), (005), (006), (007), and (008) for determination; and it is further

Doria v Benisch
Index No. 10-34989
Page No. 2

ORDERED that motion (002) by defendant, Raffi Barsoumian, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against him is granted; and it is further

ORDERED that motion (003) by defendants, Andrea Leslie Sacknoff, M.D., Andrea Leslie Sacknoff, M.D., P.C., and West Carver Medical Associates, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is denied; and it is further

ORDERED that motion (004) by defendant, Melville Surgery Center, LLC, pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against it is denied; and it is further

ORDERED that motion (005) by defendant, Huntington Hospital, pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against it is granted with prejudice; and it is further

ORDERED that motion (006) by defendant, Joseph Patane, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against him is denied; and it is further

ORDERED that motion (007) by defendant, USA Medical Services, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against it is granted; and it is further

ORDERED that cross motion (008) by plaintiffs, for an order precluding the defendants from seeking an apportionment of damages pursuant to CPLR Article 16 is granted and the remaining defendants are precluded from asserting the benefits of Article 16 against any co-defendant against whom the complaint has been dismissed.

In this medical malpractice action, the plaintiff, Gary Doria, alleges that the defendants negligently departed from good and accepted practice in the care provided in treating him for acute inflammation of the gall bladder (cholecystitis) and gallstones (cholelithiasis). Causes of actions premised upon negligence and lack of informed consent have been pleaded against the defendants. A derivative claim has been asserted by plaintiff's spouse, Patricia Doria. A separate cause of action has been asserted against Huntington Hospital sounding in, inter alia, negligence and negligent hiring and supervision. It is claimed that the plaintiff was under the care of defendant gastroenterologist, Andrea Leslie Sacknoff, M.D. of West Carver Medical Associates, P.C., who referred him to defendant David Benisch, M.D. of Melville Surgery Center LLC. Dr. Benisch performed a laparoscopic cholecystectomy on the plaintiff on August 3, 2009 at Melville Surgery Center due to cholecystitis and cholelithiasis. The plaintiff was subsequently discharged from Melville Surgery Center on August 3, 2009. He was thereafter seen on August 5, 2009 by Dr. Patane at Huntington Hospital emergency department and was admitted to Huntington Hospital. He was also seen by Dr. Steinberg, a gastroenterologist, who performed an ERCP with stent placement on August 7, 2009. The plaintiff was subsequently readmitted to Huntington Hospital on September 8, 2009, where he underwent per cutaneous drainage and was discharged on September 10, 2009 with a drain and PICC line in place for administration of long-term antibiotic therapy. It is alleged that the defendants, including the staff and employees at Huntington Hospital, failed to perform appropriate workups and timely diagnose and treat the plaintiff for a bile leak and/or gall stones on August 5, 2009, contributing to a delay in treatment to repair a cystic duct leak resulting in a severe peritonitis and abscesses, and prolonged hospitalization.

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]).

In support of motion (002), defendant Daffo Barsoumian, M.D. has submitted, inter alia, an attorney’s affirmation; the affirmation of Gregory Zito, M.D.; copies of the summons and complaint, amended summons and amended complaint, his answer and demands, plaintiffs’ verified bill of particulars; the unsigned but certified transcripts of the examinations before trial of David Lance Benisch, M.D. dated March 6, 2012, and Gary Doria dated October 5, 2011 which is considered as not objected to by any party (see *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Expert testimony is limited to facts in evidence, and the moving defendant has submitted no medical records for this court’s review (see also *Allen v Uh, supra*; *Marzuillo v Isom, supra*; *Stringile v Rothman, supra*; *O’Shea v Sarro, supra*; *Hornbrook v Peak Resorts, Inc. supra*). The moving defendant has also failed to provide copies of the answers served by his co-defendants as required pursuant to CPLR 3212. Defendant Barsoumian has not submitted a stipulation of discontinuance signed by all parties.

In support of motion (003), defendants, Andrea Leslie Sacknoff, M.D., Andrea Leslie Sacknoff, M.D., P.C., and West Carver medical Associates, P.C., have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, amended summons and amended complaint, their answers, and plaintiffs’ verified bill of particulars as to defendants Benisch, Barsoumian, Melville Surgery Center, Patane, the moving defendants, Steinberg, Endoscopy OBS, Huntington Medical Group and Huntington Hospital; the unsigned but certified transcript of the examination before trial of Gary Doria dated October 5, 2011 which is considered (see *Zalot v Zieba, supra*); uncertified copy of Huntington Hospital record which is not in admissible form; and the expert affidavit of Sanford R. Goldberg, M.D. These moving defendants have also failed to provide copies of the answers served by their co-defendants as required pursuant to CPLR 3212.

In support of motion (004), defendant Melville SC, LLC has submitted, inter alia, an attorney’s affirmation; the affirmation of William A. Lois, M.D.; copies of the summons and complaint, amended summons and amended complaint, its answer to the amended complaint, plaintiff’s verified bill of particulars; the unsigned but certified transcript of the examinations before trial of Gary Doria dated October 5, 2011 which is considered (see *Zalot v Zieba, supra*); certified Huntington Hospital record; uncertified medical records of defendants Benisch and Sacknoff/West Carver which are not in admissible form (CPLR 3212, 4518; *Friends of Animals v Associated Fur Manufacturers Inc., supra*); and the

moving defendant's certified office record. These moving defendants have also failed to provide copies of the answers served by their co-defendants as required pursuant to CPLR 3212.

In support of motion (005), defendant Huntington Hospital has submitted, inter alia, an attorney's affirmation; affidavit of Randolph Howard; affirmation of William Miller, D.O.; copies of the summons and complaint, amended summons and amended complaint, its answer, plaintiff's verified bills of particulars; plaintiff's expert witness disclosure; the unsigned but certified transcripts of the examinations before trial of Patricia Doria dated January 31, 2012, Gary Doria dated October 5, 2011, and David Benisch dated March 6, 2012 with proof of service pursuant to CPLR 3116; and a certified copy of the Huntington Hospital record.

In support of motion (006), defendant Joseph Patane, M.D. has submitted, inter alia, an attorney's affirmation; the affirmation of William Miller, D.O.; copies of the summons and complaint, amended summons and amended complaint, his answer, plaintiff's verified bills of particulars; plaintiffs' amended expert witness response; the unsigned but certified transcripts of the examinations before trial of Patricia Doria dated January 31, 2012, Gary Doria dated October 5, and David Benisch dated March 6, 2012 with proof of service pursuant to CPLR 3116; and a certified copy of Huntington Hospital record.

In support of motion (007), defendant USA Medical Services has submitted, inter alia, two attorney's affirmations; the notarized out-of-state affidavit of Shirley Chatterton with exhibits; copies of the amended summons and amended complaint, its answer to the amended complaint, plaintiff's verified bills of particulars; the unsigned but certified transcripts of the examinations before trial of Patricia Doria dated January 31, 2012, Gary Doria dated October 5, 2011, David Benisch dated March 6, 2012; copy of a notice of motion dated February 25, 2013 relating to Raffi Barsoumian, M.D.; copy of an affirmation by Gregory Zito, M.D.; answers served by defendants Benisch, Barsoumian, Melville Surgery Center, Patane, Sacknoff, Sacknoff, P.C., West Carver Medical Associates, Steinberg, Huntington Medical Group, Huntington Hospital, and Endoscopy OBS. It is noted that counsel for USA Medical Services incorporates into his affirmation the arguments expressed by counsel for defendant Barsoumian in the attorney's affirmation dated February 25, 2013.

In support of cross motion (008), submitted also in opposition to defendants' motions (003), (004), (005), (006), and (007), plaintiff has submitted, inter alia, an attorney's affirmation; the redacted affirmation of plaintiffs' expert physician¹; and an uncertified copy of the LIJ/North Shore Hospital record.

Uncertified medical records are not in admissible form (CPLR 3212, 4518, *Friends of Animals v Associated Fur Mfrs.*, *supra*). Expert testimony is limited to facts in evidence, and the uncertified records are not in evidence (*see also Allen v Uh*, *supra*; *Marzuillo v Isom*, *supra*; *Stringile v Rothman*, *supra*; *O'Shea v Sarro*, *supra*; *Hornbrook v Peak Resorts, Inc.* *supra*). In searching the record, a certified copy of the Huntington Hospital record has been noted, as well as the answers served by all defendants.

¹In opposing motion, the plaintiff has submitted an unredacted copy of the expert's affirmation to this court for *in camera* inspection as required pursuant to *Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc.2d 349, 527 NYS2d 680 [NY County 1988]), and the same has been returned to counsel for the plaintiff.

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 Derdarian 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]).

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]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

David Benisch, M.D. testified to the extent that he is board certified in surgery and maintained an office in Huntington in 2009 as David Benisch, M.D., P.C. at the Melville Surgery Center where he was a partner. He stated that Gary Doria's internist, Jed Weinberg, M.D., sent him a consult note advising he had seen the plaintiff. Dr. Benisch was then called by Dr. Andrea Leslie Sacknoff, M.D. who apprised Dr. Benisch on July 31, 2009, that she was referring Gary Doria to him due to the plaintiff experiencing multiple gallbladder attacks. She further apprised him that a sonogram obtained on July 31, 2009 revealed gallstones and possibly acute cholecystitis. Dr. Benisch testified that he first saw Gary Doria on July 31, 2009, at which time he complained of right upper abdominal pain which he was experiencing frequently, and that he demonstrated guarding upon examination of the abdomen. Dr. Benisch testified that gallstones were demonstrated by the sonogram obtained on July 31, 2009, at Medical Arts Radiology, which report had been faxed to him. He stated that he did not see the report until August 1, 2009, and that he saw the plaintiff and wrote his consult note for Dr. Weinberg prior to seeing the report. He continued that he may have spoken to the radiologist, Dr. Goodman, prior to receiving the report. After he saw the plaintiff, he advised Dr. Sacknoff that the plaintiff needed his gallbladder removed on an urgent basis due to increasing pain, possible acute cholecystitis. He advised the plaintiff that he was scheduling surgery at the Melville Surgery Center. Dr. Benisch stated that he explained how the procedure would be done, as well as the risks and benefits of the surgery, including bleeding, infection, bile leak (communicated as leakage from surgery), common bile duct injury, and risk associated with anesthesia.

Dr. Benisch testified that after seeing the plaintiff, he did not consider obtaining a HIDA scan because it was not indicated. He testified that a HIDA scan is a nuclear medicine test where radioactive material is injected into a vein and concentrates in the gallbladder and shows if the gallbladder is functioning. However, it does not show the location of stones unless there is a blockage in the common bile duct by a stone. He stated that he did not need that information prior to surgery. He continued that he only orders a HIDA scan if he needs confirmation that someone has a gallbladder problem. In the plaintiff's case, there was clear confirmation based on history, physical exam, and sonogram, so a HIDA scan was not necessary. Dr. Benisch did not recall if he had seen the sonogram films. He stated that he told the plaintiff that surgery was urgent as he was experiencing increasing attacks and there was evidence that the gallbladder was inflamed. He told the plaintiff that the surgery would be done at the Melville Surgicenter. He did not give the plaintiff any alternative as to where he could have the surgery because the Melville Surgery Center is where he performs laparoscopic surgery. Dr. Benisch did not consider doing an open procedure and set forth the reasons why.

Dr. Benisch testified that prior to surgery, the plaintiff became very anxious in the preoperative area and was almost jumping off the stretcher trying to leave as he did not want to have the surgery. He stated that the plaintiff was concerned because someone he knew died from anesthesia. He stated that he reassured the plaintiff and had the anesthesiologist speak to him. Dr. Benisch testified that during surgery, he was assisted by Dr. Barsoumian, with whom he had worked on multiple other cholecystectomies. Dr. Barsoumian was neither a partner or an employee with him or the Melville Surgery Center. Dr. Benisch testified that during surgery, Dr. Barsoumian held the graspers that hold the gallbladder, and did not participate in the clipping of the duct or using the scissors. Dr. Benisch described the surgery, and stated that while he could visualize the cystic duct and its connection to the common bile duct and cystic artery, the common bile duct was not visible within the triangle of Calot. He did visualize the cystic duct connection to the gallbladder and noted nothing unusual about its location. He viewed the procedure on a monitor but the procedure was not videotaped. He described how he placed three clips on the cystic duct and one clip on the gallbladder side. He inspected the clipping placed on the bile duct for any leaks and none were seen upon visual inspection. He did not perform an intraoperative cholangiography as there was no indication to do so. He continued that the gallstones did not present any difficulty in removing the gallbladder. Dr. Benisch did not recall seeing the plaintiff in the recovery room after surgery and stated the anesthesiologist discharged the plaintiff from recovery. Dr. Benisch state that it was his custom to give discharge instructions to a family member after surgery when he advised how the surgery went. The plaintiff was to see him in one week following surgery.

Dr. Benisch testified that he examined the plaintiff on August 4, 2009, for complaints of abdominal pain. He found no abdominal distention and no tenderness. He obtained no vital signs. Dr. Benisch testified that the plaintiff's pain was consistent with postoperative pain. He also considered that the plaintiff could have a bile leak, however, he ordered no testing to determine if there was a bile leak. Although he did not rule out a bile leak at the time, he stated that he was satisfied that it was not a bile leak based upon the physical examination. He gave the plaintiff an injection of pain medication, Toradol, and switched his oral pain medication to Percocet and Ultracet. He continued that the plaintiff's wife called back the following day, August 5, 2009, advising him the plaintiff appeared jaundiced. Dr. Benisch was leaving for vacation on August 5, 2009 until August 8, 2009, so he told Mrs. Doria to go to the emergency room at Huntington Hospital where he would be seen by Dr. Patane who was covering for him. Dr. Benisch called Dr. Patane and explained that the plaintiff had a laparoscopic cholecystectomy and needed to

be investigated for a bile leak or a stone in the common bile duct. He also called Dr. Sacknoff and told her that the plaintiff would likely need an ERCP to determine the problem, and if necessary, place a stent or do a sphincterotomy to relieve any pressure on the ductal system.

Dr. Benisch testified that he next saw the plaintiff on August 8, 2009 at Huntington Hospital, and noted the plaintiff's bilirubin level was decreasing, his hematocrit was stable, and his abdomen was distended and nontender. He had been diagnosed with a bile leak by HIDA scan performed on August 6, 2009. Dr. Steinberg performed an ERCP, and placed a stent in the common bile duct to relieve any back pressure in the biliary system on August 7, 2009. Dr. Benisch testified that he never made any determination concerning how the bile leak occurred. Dr. Benisch testified that the bile leak was not caused by the clipping procedure on the bile duct. His plan of treatment was to obtain a CAT scan, a repeat HIDA scan, and laboratory work to help determine if there was a persistent bile leak. Dr. Sacknoff ordered both the HIDA scan and the CAT scan. When he saw the plaintiff on August 9, 2009, the plaintiff's bilirubin was abnormally high, indicating that there was possibly still a bile leak, or a delay in returning to normal.

Dr. Benisch testified that Dr. DiBlasio, the critical care physician at Huntington Hospital, saw the plaintiff on August 9, 2009 at 8 p.m., and noted the plaintiff had worsening abdominal distention and called him. He went back to the hospital to see the plaintiff about 9:30 p.m. An NG tube was placed which obtained 700 cc. of bilious fluid, which he stated indicated nothing specific. Abdominal distention then lessened, and his abdomen was nontender. X-rays showed an ileus pattern indicating sluggish intestines. On August 10, at 9:30 a.m., there was evidence of possible infection and persistent leakage and drainage of bile. A CAT scan was done which showed an increase in ascites in the abdomen and pelvis when compared with the prior study of August 5, 2009. No biliary duct dilatation was noted. Dr. Benisch thought that maybe a drain could be placed as there was concern for persistent leakage from the cystic duct. On August 10, 2009, Dr. Benisch determined that the fluid was due to a bile leak. The HIDA scan from August 10, 2009 showed persistent bile leakage from the region of the cystic duct. He advised the plaintiff of the need to drain the fluid either percutaneously or by laparoscopic surgery. On August 10, 2009, Dr. Tizol, an interventional radiologist, performed the paracentesis percutaneously for 4.3 liters of fluid from the bile leak. Dr. Benisch was present for the procedure. The drain was left in place, but the bile leak was still present. On August 11, 2009, Dr. Tizol repositioned the parabolic catheter as it was in the fat tissue and not within the ascitic fluid. Thereafter, Dr. Tirol place two additional drains.

Dr. Benisch testified that on August 13, 2009, the plaintiff had another HIDA scan which revealed interval resolution of the bile leak, indicating to him that the leak had sealed, thus, there was no longer a need for another ERCP or sphincterotomy. A repeat CT scan showed minimal reduction of the ascites, the persistent fluid from the original bile leak, which Dr. Benisch testified meant that the drains were not suctioning enough. The drains were therefore attached to suction instead of gravity drainage. On August 16, 2009, he ordered an infectious disease consult with Dr. Popp as there was a positive culture, Vancomycin-resistant enterococcus, from the fluid being drained. Dr. Hoey, also of infectious disease, placed the plaintiff on antibiotics. A CAT scan on August 18, 2009 revealed interval decrease in the volume of peritoneal fluid within the left mid abdomen and right pelvis of the perihepatic and perisplenic fluid. On August 20, 2009, the plaintiff was cleared for discharge from Huntington Hospital without the drains. On September 3, 2009, the plaintiff saw Dr. Benisch and complained of "vague abdominal pain" with guarding. A repeat CAT scan on that date revealed fluid re-collection. When he saw the plaintiff on September 5, 2009, the plaintiff complained of swelling at a drain site, but there was no drainage when he

Doria v Benisch
Index No. 10-34989
Page No. 8

opened up the site. He also complained of an increased temperature. Dr. Benisch testified that he gave the plaintiff a prescription for Cipro and told him to have a repeat CAT scan in three days, which he did on September 8, 2009. Thereafter, he advised the plaintiff that he would need a percutaneous drain inserted again and would have to go back to the hospital. He saw the plaintiff and his wife in the emergency room at Huntington Hospital, and the plaintiff advised him that they no longer wanted him to provide care and treatment. He did not remember if at any time that the plaintiff had a hematoma on his body.

MOTION (002)

In motion (002), defendant Raffi Barsoumian, M.D. seeks summary judgment dismissing the complaint as asserted against him.

Dr. Barsoumian submitted the affirmation of his expert, Gregory Zito, M.D., a physician licensed to practice medicine in New York State who is board certified in surgery. Dr. Zito has not set forth his work experience and/or submitted a copy of his resume to qualify as an expert in this matter. He set forth the materials and records which he reviewed, and set forth his opinions within a reasonable degree of medical certainty. It is Dr. Zito's opinion that the medical care and treatment provided to the plaintiff by Dr. Barsoumian was in accordance with acceptable medical and surgical practice, and that his treatment was not the cause of the injuries claimed by the plaintiff.

Dr. Zito set forth the plaintiff's history and described the surgery performed on the plaintiff. He stated that Dr. Barsoumian's role was limited to holding the two graspers to manipulate the gallbladder, and, at times, hold the camera used to view the operative field. Dr. Zito continued that Dr. Barsoumian did not participate in the use of any electrocautery or scissors, and did not participate in the clipping of either the cystic duct or the cystic artery. He stated that Dr. Barsoumian did not see Mr. Doria again following the completion of the laparoscopic cholecystectomy on August 3, 2009.

Based upon the foregoing, Dr. Barsoumian has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him. It is noted that counsel for the plaintiffs has set forth in his opposing papers that the plaintiffs do not oppose the motion of Dr. Raffi Barsoumian, M.D.

Accordingly, motion (002) by defendant Dr. Barsoumian is granted and the complaint as asserted against him is dismissed.

MOTION (003)

In motion (003), defendants Andrea Leslie Sacknoff, M.D., Andrea Leslie Sacknoff, M.D., P.C., and West Carver Medical Associates, P.C. seek summary judgment dismissing the complaint asserted against them on the bases that she did not depart from good and accepted standards of medical care and treatment and did not proximately cause the injuries claimed by the plaintiff.

The Sacknoff defendants and West Carver Medical Associates have submitted the affidavit of their expert, Sanford R. Goldberg, M.D., in support of their application. Dr. Goldberg stated that he is licensed to practice medicine in New York State and is board certified in internal medicine and gastroenterology. He has been in private practice since 1986, but does not set forth the basis for his expert opinions. He set

forth that he has thoroughly evaluated all materials available, however, he does not set forth the materials reviewed and upon which he bases his opinion that there is a complete lack of evidence to suggest there were any deviations on the part of Dr. Sacknoff starting on August 3, 2009, continuing through September 3, 2010. Dr. Goldberg has set forth his opinions in a broad and conclusory manner, unsupported with the bases for his opinions. He does not state the standards of care and how Dr. Sacknoff comported with the standards of care for her area of practice.

Dr. Goldberg stated that Dr. Sacknoff correctly assessed the plaintiff on July 31, 2009 as having an acute exacerbation of the plaintiff's known gallbladder disease that required urgent surgical evaluation. He continued that on August 5, 2009, Dr. Sacknoff evaluated Mr. Doria in a timely fashion and had him evaluated for a bile leak by Dr. Steinberg who verified the leak with a HIDA scan on August 6th. The HIDA scan was then followed by a therapeutic/diagnostic ERCP on August 7, 2009 which showed a cystic duct remnant leak for which a 7-F stent was correctly placed for treatment. Dr. Goldberg continued that, unfortunately, the plaintiff had both an abdominal wall hematoma and collections of bile that subsequently became infected, and he developed several abscesses which were drained. Dr. Goldberg set forth additional treatments, but does not indicate the dates the plaintiff was seen by Dr. Sacknoff, any care or treatment provided by her, and how she comported with the standard of care. He stated that the plaintiff had postoperative complications that had no relationship to either a lack of action on the part of Dr. Sacknoff, or incorrect assessment of plaintiff's condition at the time of his evaluation of August 5th. He stated that Dr. Sacknoff indicated in her note of August 9th that the plaintiff refused to have an NGT placed when he was complaining of abdominal distension and discomfort. Dr. Goldberg stated that this noncompliance by the plaintiff with a simple procedure may have contributed to his further increasing abdominal collections by allowing an increased simulation of bile flow by gastric distention and continuing secretion of digestive fluids. He does not indicate, however, Dr. Sacknoff's attempts, if any, to explain the necessity of the NGT, and what her responsibility was in response to the plaintiff's refusal. Nor does Dr. Goldberg indicate the length of time from when the plaintiff refused NGT placement until the NGT was actually placed.

Dr. Goldberg stated that the plaintiff has a large output cystic duct remnant and/or CBD injury leak that was amenable to both ERCP therapeutic stenting and percutaneous drainage of the bilomatous collections by IR placed drains. Dr. Goldberg continued that it is conceivable that these complications were the result of the delay by the patient in having the gallbladder surgery which resulted in an inflammatory anomaly in his ductile anatomy, increasing his risks for a bile leak. However, it is noted that Dr. Lois, the expert for defendant Melville Surgery Associates in motion (004), set forth that the plaintiff presented to West Carver Medical Associates with complaints of abdominal pain on June 26, 2009, for which Prilosec was prescribed, thus, raising factual issues as to the cause of delays.

Based upon the foregoing, it is determined that Dr. Sacknoff and West Carver Medical Associates have not demonstrated prima facie entitlement to summary judgment dismissing the complaint.

It is further noted that the plaintiff has submitted an expert affirmation which raises factual issues which preclude summary judgment being granted to Dr. Sacknoff and West Carver Medical Associates. The plaintiffs' expert, a physician licensed to practice medicine in New York and California, is board certified in surgery. He/she has set forth his education and training upon which he bases his expert opinions. The plaintiff's expert has set forth a detailed explanation of the various medical terms, tests, and conditions involved in this action, as well as the plaintiff's medical history from August 3, 2009 through

Doria v Benisch
Index No. 10-34989
Page No. 10

September 10, 2009. It is plaintiffs' expert opinion that the Sacknoff defendants and West Carver Medical Associates P.C. departed from the accepted standards of medical care and practice proximately causing delay in the treatment for the injuries claimed by the plaintiff, resulting in the severe degree of the plaintiff's peritonitis and abscesses. The plaintiffs' expert opined that had the plaintiff been properly and timely worked up for a bile leak and/or stone on August 5, 2009, an ERCP with stenting would have been performed the following day on August 6, 2009, thus avoiding delay in treatment that resulted in the increased severity of the patient's peritonitis and abdominal abscesses and the need for prolonged hospitalization and drainage. Plaintiff's expert stated that an MRCP is a specific type of MRI which visualizes the pancreas and bile ducts. An MRCP provides the same visual picture as an ERCP, which is an evasive procedure utilizing both an upper endoscopy and x-rays to treat tissues with the pancreatic ducts and/or bile ducts.

It is plaintiffs' expert's opinion that Dr. Sacknoff departed from good and accepted standards of care in failing to timely and properly perform a work up for a bile leak and/or stone, including an MRCP on August 5, 2009 because the standard of care required that a suspected bile be investigated promptly to avoid a worsening of any active infection, abscesses, the need for prolonged hospitalization, and drainage. As such, Dr. Sacknoff failed to comport with the standard of care, which was a contributing factor in the worsening of the plaintiff's peritonitis and abdominal abscesses. Had such workup been performed on August 5, 2009, the location of the bile leak would have been determined, and the ERCP and stenting would have been performed at least one day sooner than it was on August 7, 2009.

The plaintiff's expert continued that Dr. Sacknoff was aware of the plaintiff's complaints of dark colored urine and jaundice, and that he had a laparoscopic cholecystectomy two days prior. She noted that a bile leak was probable, and had been informed earlier that day that the plaintiff would need an ERCP. Despite this knowledge, Dr. Sacknoff did not order an MRCP and instead chose to take no action other than to wait for the patient to see a different gastroenterologist, Dr. Steinberg, the following morning. The plaintiff's expert opined that Dr. Sacknoff's failure to order an MRCP at the time allowed the situation to continue to exist until a HIDA scan was ultimately performed on August 6, 2009. The record, he stated, does not indicate that Dr. Sacknoff was unable to order an MRCP on August 5, 2009, thus she deviated from the standard of care and failed to reveal the leak which could have been properly treated a day sooner. This delay allowed the bile peritonitis to remain in the peritoneal cavity for an extra day causing a worsening of the infection and abscesses.

Based upon the foregoing, the plaintiffs have raised factual issues concerning Dr. Sacknoff's alleged departures from the standards of care which caused a worsening of the plaintiff's condition and progression of the peritonitis and abscesses, precluding summary judgment to the Sacknoff defendants and West Carver Medical Associates.

According, motion (003) by the Sacknoff defendants and West Carver Medical Associates is denied.

MOTION (004)

In motion (004), defendant Melville Surgery Center, LLC seeks summary judgment dismissing the complaint asserted against him on the bases that it is an ambulatory surgical center which cannot be held vicariously liable for the acts of a patient's private attending physician, and that the facility exercised no

independent medical judgment in treating the patient and merely provided the space for the procedure to be performed.

Melville Surgery Center has submitted the expert affirmation of William A. Lois, M.D. who affirmed that he is licensed to practice medicine in New York State and is board certified in surgery. He stated that he reviewed the pleadings and the relevant medical records, films and testimony, but has not identified with any specificity what records, films and testimony were reviewed, and upon which he bases his opinions. It is Dr. Lois's opinion within a reasonable degree of medical certainty that the care rendered to the plaintiff at Melville Surgery Center during the plaintiff's admission on August 3, 2009 was at all times in accordance with good and accepted medical practice, and did not proximately cause any damages to the plaintiff.

Dr. Lois set forth the plaintiff's history from June 26, 2009 when he presented to West Carver Medical Associates with complaints of abdominal pain for which Prilosec was prescribed, however, he does not indicate which physician saw the plaintiff. Dr. Lois continued to set forth the plaintiff's care and treatment and that he was seen by Dr. Benisch who advised that surgery was needed. Dr. Benisch scheduled the plaintiff for surgery at Melville Surgery Center. Dr. Lois stated that the plaintiff testified that he never heard of Melville Surgery Center and that it was Dr. Benisch who recommended that the surgery be performed there. On August 3, 2009, the plaintiff underwent a cholecystectomy by laparoscopic surgery by Dr. Benisch. Dr. Lois set forth that the plaintiff had been admitted to Melville Surgery Center, and that the procedure was completed without incident, and the plaintiff was discharged home that day.

Dr. Lois continued that Dr. Benisch was the plaintiff's private attending physician, was board certified in surgery, decided the type of surgery to perform, the type of equipment to be used, the position in which plaintiff should be placed during the procedure, and that he performed all aspects of the plaintiff's surgery, including the location, type, manner and technique utilized. Thus, opined Dr. Lois, Dr. Benisch exercised full and appropriate control over the surgery performed on the plaintiff on August 3, 2009. Dr. Lois stated that there is no indication that any employee of Melville Surgery Center ever acted outside the scope of the attending surgeon's direction or exercised independent medical judgment in the care and treatment of the decedent, and that the staff timely and properly carried out all of Dr. Benisch's intraoperative orders.

Dr. Lois continued that none of the orders by Dr. Benisch were contraindicated for the patient and were properly carried out. He continued that the personnel in the operating room were not in a position to question whether or not the surgeon properly diagnosed plaintiff's cystic bile duct leak, and were only there for the purpose of providing the surgeon with assistance as needed. Dr. Lois testified that although the plaintiff had complaints of pain in the recovery room, it was much too soon to suspect or diagnose a bile leak, and if it were suspected, a CT scan would be ordered two to three days later, as was done by Dr. Benisch. Dr. Lois continued that there is no evidence Melville Surgery Center failed to keep accurate records; hired inexperienced or incompetent and improperly skilled staff; failed to promulgate necessary and proper rules; failed to properly train employees; or improperly manipulated plaintiff's body during the procedure. He further stated that Melville Surgery Center insured that consent was obtained by the surgeon and was signed by the patient prior to surgery. Thus, concluded Dr. Lois, there was no act or omission on the part of Melville Surgery Center staff or its employees which was a proximate cause of any injury plaintiff allegedly suffered.

Doria v Benisch
Index No. 10-34989
Page No. 12

Under the doctrine of respondeat superior, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment (*Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 34 [1st Dept], *cf.*, *Beauchamp v City of New York*, 3 AD3d 465, 771 NYS2d 129 [2d Dept 2004]). However, a shareholder, employee, or officer of a professional corporation is liable only for negligent or wrongful acts committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation *Moller v Talliuaga*, 255 AD2d 563, 681 NYS2d 90 [2d Dept 1998]).

Based upon the foregoing, it is determined that Melville Surgery Center has not established prima facie entitlement to summary judgment dismissing the complaint asserted against it as a matter of law. David Benisch, M.D. testified to the extent that he is a partner at Melville Surgery Center where he performed surgery on the plaintiff on August 3, 2009. He also testified that he told the plaintiff that he was scheduling surgery at the Melville Surgery Center. He did not give the plaintiff the option of having surgery performed at any other facility or hospital. Dr. Lois did not opine as to liability with regard to the surgery performed by Dr. Benisch to establish that Dr. Benisch did not depart from the good and accepted standards of care and treatment in causing the bile leak, or in timely and properly diagnosing and treating the plaintiff's bile leak, peritonitis and abscesses. Thus, Melville Surgery Center has not demonstrated that Dr. Benisch was not working within the scope of his employment, and that he did not negligently depart from the good and accepted standards of care and treatment of the plaintiff, and did not proximately cause any injuries claimed by the plaintiff.

Accordingly, motion (004) by Melville Surgery Center is denied.

MOTION (005)

In motion (005), defendant Huntington Hospital seeks summary judgment dismissing the complaint asserted against it on the bases that it is not vicariously liable for its co-defendants who were not employees of Huntington Hospital; that none of its employees or staff departed from the standards of care; and that it did not proximately cause the injuries claimed by the plaintiff. It has submitted the affidavit of Randolph Howard, and the expert affirmation of William Miller, D.O.

Randolph Howard averred that he is currently vice president of operations at Huntington Hospital, and upon conducting a search of the records, confirms that Melville Surgery Center LLC is not owned, operated, or staffed by Huntington Hospital, and is not in any way affiliated with either Huntington Hospital or North Shore Long Island Jewish Health System. Howard continued that David L. Benisch, M.D., Raffi Barsoumian, M.D., Joseph Patane, M.D., Andrea Leslie Sacknoff, M.D., and Jay Steinberg, M.D. are not employees of Huntington Hospital, and except for Raffi Barsoumian, M.D., they are voluntary physicians credentialed with privileges at Huntington Hospital. He stated that Raffi Barsoumian, M.D. was not credentialed by Huntington Hospital and did not have admitting or surgical privileges at Huntington Hospital in August 2009.

William Miller, D.O. affirms that he is a physician licensed to practice medicine in New York State and is board certified in general surgery. Dr. Miller has not set forth his education and training, but affirms that he has performed at least 1,000 laparoscopic cholecystectomies during his more than thirty years practice, and has assisted in a great number as well. He has set forth his opinions within a reasonable

Doria v Benisch
Index No. 10-34989
Page No. 13

degree of medical certainty, and opined that no employee of Huntington Hospital deviated from the standard of care at any time during the care and treatment of Gary Doria. His detailed report set forth the bases for his opinions.

Dr. Miller set forth the care and treatment provided to the plaintiff during his admission to Huntington Hospital, as well as findings upon examination and testing, and the plaintiff's condition during that admission. He stated that cultures came back positive for Vancomycin resistant enterococcus, an aggressive and opportunistic contaminant that had numerous areas of access, including the initial surgical sites and incisions, and was not due to any wrongdoing by the staff and employees at Huntington Hospital. Dr. Miller stated that the physicians caring for the plaintiff were not employees of the hospital. He set forth orders that were made by the various treating physicians and indicated that the employees and staff at Huntington Hospital promptly and correctly implemented those orders, performed all ordered tests properly, and administered medications appropriately. Dr. Miller opined that the staff at Huntington Hospital comported with the standard of care and did not proximately cause any of the injuries claimed by the plaintiff.

Based upon the foregoing, Huntington Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint asserted against it. The plaintiff has not opposed this motion by Huntington Hospital and plaintiff's expert physician offers no opinion with regard to the care and treatment provided by the staff and employees at Huntington Hospital.

Accordingly, motion (005) by Huntington Hospital is granted and the complaint is dismissed with prejudice.

MOTION (006)

In motion (006), defendant Joseph Patane, M.D. seeks summary judgment dismissing the complaint asserted against him on the bases that he did not depart from the standard of care; was not involved in the plaintiff's care and treatment after August 7, 2009; and caused no injury to the plaintiff.

Dr. Patane has submitted the affirmation of his expert, William Miller, D.O., who affirms that he is a physician licensed to practice medicine in New York State and is board certified in general surgery. Dr. Miller has not set forth his education and training, but affirms that he has performed at least 1,000 laparoscopic cholecystectomies during his more than thirty years practice, and has assisted in a great number as well. Dr. Miller opined within a reasonable degree of medical certainty that Dr. Patane did not deviate from the standard of care at any time during his care and treatment of the plaintiff and did not cause any injury to the plaintiff.

Dr. Miller stated that when Dr. Patane, a general surgeon, was asked by Dr. Benisch to cover for him when the plaintiff was admitted to Huntington Hospital on August 3, 2009, he found the plaintiff was jaundiced but in no acute distress, that the plaintiff's urine had turned a shade of dark brown, and that he was experiencing tenderness in his abdomen in the right upper and right lower quadrant regions. Dr. Patane's history noted that the CAT scan and ultrasound were suggestive of a bile leak, his bilirubin was elevated to 13.2. and that the findings could be consistent with a cystic duct/liver bed bile leak, possibly secondary to common duct stone. Dr. Miller stated that the plaintiff was properly admitted to the hospital,

that Dr. Patane properly obtained a history and physical, evaluated the radiological studies, requested a gastroenterology consult with respect to the potential leak, and ordered IV fluids and broad spectrum antibiotics.

On August 6, 2009, Dr. Miller stated, Dr. Patane noted that the plaintiff was resting comfortably, his vital signs were stable, he was afebrile, jaundiced, his lungs were clear, his abdomen soft and less tender, there were positive bowel sounds, and his extremities were not edematous. After the plaintiff was seen by gastroenterology, a HIDA scan and ERCP procedure were scheduled for the next day, August 7, 2009. Dr. Patane noted that the plaintiff's white blood count dropped from 22,000 to 9,000, and his hemoglobin dropped from the fluids prescribed. Dr. Miller stated that upon requesting the gastroenterology consult, it was not within Dr. Patane's capability to determine the timing of any testing or procedures performed thereafter.

Dr. Miller stated that on August 7, 2009, Dr. Patane saw the plaintiff after the ERCP stent replacement and noted that the plaintiff's abdomen was distended with increased ecchymosis in the peri-umbilical and flank areas, but there was no guarding or rebound, and no edema of the extremities. It was Dr. Patane's assessment that the plaintiff had a biliary leak and decreased hematocrits, so his plan was to have the plaintiff transfused, transferred to the step-down unit, and to have serial hematocrits.

Dr. Miller stated that the statements by the plaintiff's expert physician that Dr. Patane failed to make recommendations as to treatment during the August 5, 2009 admission, failed to act on signs and symptoms evidenced on August 5, 2009, failed to recommend a HIDA scan or ERCP, or consider lab results or the results of the CT scan and/or ultrasound, are belied by Dr. Patane's history and physical. Dr. Miller stated that it was "certainly implied within the history and physical that these issues" (jaundice, edema, swelling and/or tenderness of the right side of the abdominal wall), were a result of the possible leak which was clearly identified by Dr. Patane prior to the HIDA scan or ERCP. Dr. Miller stated that when Dr. Patane noted ascites shown on the August 5, 2009 CAT scan and ultrasound, he referred the plaintiff to gastroenterology. He continued that there was no need for a drain to be placed immediately as it was not known where the leak occurred, or how it should be repaired, as the HIDA scan was required for that. Dr. Miller continued that once the location of the leak was determined, the ERCP was performed, and shortly thereafter a stent placed. Thereafter, Dr. Patane was no longer involved in the care and treatment of the plaintiff.

Based upon the foregoing it is determined that Dr. Patane has not demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against him. Dr. Miller has raised factual issues concerning his opinion and how he disagrees with those of plaintiff's expert physician, as set forth above. Such differing opinions between plaintiff's and Dr. Miller preclude summary judgment from being granted. It is further determined that the plaintiff's expert has also raised factual issues to preclude summary judgment from being granted to Dr. Patane.

The plaintiffs' expert is a physician licensed to practice medicine in New York and California and is board certified in surgery. He/she has set forth his education and training upon which he bases his expert opinion. The plaintiff's expert has set forth a detailed explanation of the various medical terms and conditions involved in this action, as well as the plaintiff's medical history from August 3, 2009 through September 10, 2009. It is his expert opinion that Dr. Patane departed from the accepted standards of

medical care and practice proximately causing delay in the treatment for the injuries claimed by the plaintiff, resulting in the severe degree of the plaintiff's peritonitis and abscesses. The plaintiffs' expert opined that had the plaintiff been properly worked up for a bile leak and/or stone on August 5, 2009, an ERCP with stenting would have been performed the following day on August 6, 2009, thus avoiding delay in treatment that resulted in the increased severity of the patient's peritonitis and abdominal abscesses and the need for prolonged hospitalization and drainage.

The plaintiff's expert stated that Dr. Patane saw the plaintiff at 5:30 p.m. on August 5, 2009, performed a history and physical, and noted that the plaintiff had his gallbladder removed two days prior and presented with complaints of severe abdominal pain, jaundice, dark colored urine, severe abdominal pain. The plaintiff advised Dr. Patane that he had pain since surgery, and that the pain had become progressively worse on August 4, 2009, associated with abdominal distention and loss of appetite. The plaintiff's expert stated that Dr. Patane noted the results of the laboratory values, including the abnormal values reported, and wrote that the CT scan and ultrasound are suggestive of a bile leak. With an elevated bilirubin noted as well, Dr. Patane concluded that the findings could be consistent with a cystic duct liver bed bile leak, possibly secondary to common duct stone. His plan was to admit, hydrate with intravenous fluids, give Vitamin K, and have the plaintiff seen and evaluated by gastroenterology for scheduling an ERCP to determine the site of the bile leak and possibly performing common duct stenting. The plaintiff's expert stated that Dr. Patane did not order an MRCP (specific type of MRI study) at the time. The note by Sonia Reid, RPA indicated an impression to rule out a bile leak, and that the plaintiff was to have an ERCP and stent attempt performed, indicating it would be done on August 6, 2009.

The plaintiff's expert stated that according to an untimed progress note written between 9:45 p.m., and the 2:30 a.m. note on August 6, 2009, gastroenterologist Dr. Sacknoff saw the plaintiff on consult, noted the history, indicated a probable bile leak without evidence of cholelithiasis, and wrote that gastroenterologist Dr. Steinberg would see the plaintiff in the morning. Dr. Sacknoff did not order an MRCP but spoke with Dr. Benisch "at length." Dr. Patane then saw the plaintiff a second time on August 6, 2009 and noted that the plaintiff had a probable biliary leak and jaundice, and that a HIDA scan would be done that day. Later that day, Dr. Steinberg noted that the HIDA scan revealed a bile leak at the region of the cystic duct moving laterally into the left parabolic gutter. On August 7, 2009, Dr. Sternberg performed the ERCP with stent placement.

The plaintiff's expert opined that Dr. Patane deviated from the accepted standards of care in his failure to timely and properly order and/or perform a work up for a bile leak and/or stone upon plaintiff's presentation to the emergency department at Huntington Hospital on August 5, 2009. He stated that the standard of care required that when a patient presents with a history of a recent laparoscopic cholecystectomy with complaints of severe abdominal pain, jaundice, and dark colored urine, that the medical staff must consider the possibility of a bile leak and/or stone, and must timely and properly perform an appropriate work up which includes an MRCP, which was not done. The plaintiff's expert stated that Dr. Patane was clearly on notice from Dr. Benisch that Dr. Patane was to investigate the possibility of a bile leak or stone, and that Dr. Patane's failure to immediately put in place the mechanism whereby such investigation would be performed was a departure from the standard of care. The plaintiff's expert further opined that had Dr. Patane comported with the standard of care, which included an MRCP on August 5, 2009, the location of the bile leak would have been discovered that day and ERCP and stenting would have been performed much earlier than when it was ultimately performed on August 7th, thus substantially

Doria v Benisch
Index No. 10-34989
Page No. 16

mitigating the severe degree of peritonitis. This failure, stated plaintiff's expert, created a worsening of the peritonitis and abdominal abscesses leading to prolonged hospitalization and drainage.

The conflicting expert opinions concerning whether an MRCP should have been done preclude summary judgment for Dr. Patane.

Accordingly, motion (006) by Joseph Patane, M.D. for summary judgment dismissing the complaint asserted against him is denied.

MOTION (007)

In motion (007), defendant USA Medical Services, P.C. seeks summary judgment dismissing the complaint asserted against it on the bases that it is not vicariously liable as to Dr. Barsoumian.

In light of dismissal of the complaint with prejudice as asserted against defendant Dr. Barsoumian in motion (002), motion (007) has been rendered academic. However, USA Medical Services, P.C. has submitted the affidavit of Shirley Chatterton, the human resource manager for the defendant, who avers that USA Medical Services is a medical practice that provides surgical assistant services to surgeons. Upon a search of the records, she determined that Dr. Barsoumian initially commenced employment at USA Medical Services in 2006, but resigned on June 22, 2008, and was not employed by them on August 3, 2009. Therefore, it is determined as a matter of law that USA Medical Services, P.C. is not vicariously liable as to Dr. Barsoumian. It is further noted that counsel for the plaintiffs has set forth in his opposing papers that the plaintiffs do not oppose the motion of USA Medical Services, P.C.

Accordingly, motion (007) is granted and the complaint is dismissed as a matter of law as asserted against USA Medical Services, P.C.

MOTION (008)

In cross motion (008), the plaintiffs seek to preclude the defendants from asserting apportionment of damages against each other at the time of trial pursuant to CPLR Article 16.

In that the defendants herein have not produced any evidentiary proof upon which to base entitlement to the benefits provided under Article 16 as against any co-defendant, defendants are precluded from seeking apportionment against any co-defendant at the time of trial for non-economic loss as set forth in CPLR Article 1601, where the complaint has been dismissed against such co-defendant. Without having submitted expert testimony in opposition to this motion which controverts the expert opinions already submitted by co-defendants and by the plaintiff, the provisions of CPLR Article 16 are waived (*Cover et al v Cohen et al*, 113 AD2d 502, 497 NYS2d 382 [2d Dept 1985]; see *Dembitzer v Broadwall Management Corp*, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]]).

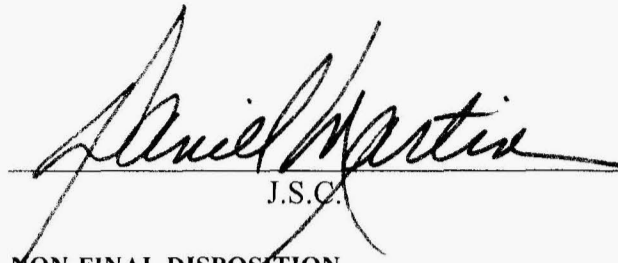
Here, the co-defendants were obligated to submit proof on point in admissible form in opposition to co-defendants' motions for summary judgment and failed to do so. Thus, they have failed to satisfy the evidentiary burden which shifted to them upon the finding that a co-defendant does not have liability in this

Doria v Benisch
Index No. 10-34989
Page No. 17

action and have thus forfeited their opportunity to limit their liability at the time of trial as to those co-defendants against whom the complaint has been dismissed.

Accordingly, motion (008) is granted and the remaining defendants are precluded at the time of trial from asserting the benefits of Article 16 against any co-defendant against whom the complaint has been dismissed.

Dated: November 18, 2013


J.S.C.

 FINAL DISPOSITION X ~~NON-FINAL DISPOSITION~~

TO: SANTANGELO, BENVENUTO & SLATTERY
Attorney for Defendant Sacknoff, M.D. and West Carver Medical Associates
1800 Northern Boulevard
Roslyn, New York 11576

MCHENRY, HORAN & LAPPING, P.C.
Attorney for Defendants Patane, M.D. and Huntington Hospital
6800 Jericho Turnpike, Suite 202E
Syosset, New York 11791

TRAUB LIEBERMAN STRAUS & SHREW
Attorney for Defendant USA Medical Services
7 Skyline Drive
Hawthorne, New York 10532

ANTHONY P. VARDARO, P.C.
Attorney for Defendant Steinberg, M.D. and
Endoscopy OBS at HMG
732 Smithtown Bypass, Suite 203
Smithtown, New York 11787