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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GEORGE J. SILVER
Justice

PART 10

Index Number : 800157/2010
HERNANDEZ, FRANCISCO CONTRERAS
vs
NYC HEALTH AND HOSPITALS
Sequence Number : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAY 20 2014

George J. Silver
_____, J.S.C.
HON. GEORGE J. SILVER

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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FRANCISCO MARTINEZ HERNANDEZ and MONICA BARRERA,

Plaintiffs,

Index No. 800157/2010

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

----------X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affirmation, Affidavit(s) & Exhibits Annexed	1, 2, 3
Answering Affirmation, Affidavit(s) & Exhibits	4, 5
Replying Affirmation, Affidavit(s) & Exhibits	6

In this action for medical malpractice defendant New York City Health and Hospitals Corporation (defendant) moves pursuant to CPLR § 3212 for an order granting it summary judgment and dismissing the complaint of plaintiff Francisco Contreras Hernandez (plaintiff). Plaintiff alleges in a verified bill of particulars that defendant's deviation from good and accepted medical practice resulted in the amputation of a portion of plaintiff's left fourth finger.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the

pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptableexcuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

In support of the motion, defendant submits an affirmation by Dr. Robert Strauch, a board certified orthopedic surgeon with sub-certification in hand surgery. According to Dr. Strauch's review of the Harlem Hospital medical records plaintiff sustained a crush injury when a forty pound weight dropped onto the fourth digit of his left hand. Physical examination in the emergency room revealed the crushed tip of the finger with avulsed, or torn away, skin. X-ray revealed a comminuted fracture of the distal phalanx with displacement of the fracture fragments. There was also significant soft tissue damage to the fingertip. Plaintiff was later evaluated by a hand surgeon, Dr. Norman Morrison, and plaintiff's wound was explored in the operating room. Following inspection of the wound it was concluded that the injured portion of the fingertip was non-viable and not salvageable. The non-viable portion of the fingertip was removed and debridement and closure was performed/ According to Dr. Strauch, the surgeons at Harlem Hospital met the standard of care for the evaluation of the suitability of a crushed fingertip for salvage by reviewing the mechanism of the injury, the condition of the fingertip and the viability of the remaining affected tissue. Dr. Strauch also contends that defendant did not improperly allow the fingertip to exsanguinate. A dressing was applied to plaintiff's fingertip in the emergency room when profuse bleeding was observed. While under surgical exploration the fingertip was pricked with a needle and although some bleeding was seen, according to Dr. Strauch, there was not enough bleeding at the edges of the remaining tissue once the non-viable tissue was removed. This lack of adequate bleeding indicated that vascularity to the injured area was too poor to preserve it. Dr. Strauch further contends that the period of time between plaintiff's initial evaluation and treatment in the emergency room and the subsequent surgical

evaluation was within the standard of care and did not meaningfully impact the condition of the fingertip upon presentation to the operating room.

Moreover, Dr. Strauch argues that because plaintiff's crushed fingertip was not salvageable as a result of the initial injury plaintiff sustained when the weight plate fell on his finger, the damages sustained by plaintiff in the form of the amputation of his fingertip were not proximately caused by any act or omission by the staff at Harlem Hospital. Dr. Staurch also opined that the other care plaintiff received at Harlem Hospital, including the taking of X-rays and the administering of antibiotics and pain medication, was appropriate.

In opposition, plaintiff's expert, Dr. David Barclas, a physician with expertise in emergency medicine, contends that defendant departed from accepted standards of medical care when 2 hours lapsed between the time plaintiff was initially seen in the emergency room and a hand/plastic surgery consult was requested. According to Dr. Barclas, there was enough information available upon plaintiff's arrival at the emergency room to request a hand/plastic surgery consult immediately. Dr. Barclas also contends defendant departed from the prevailing standard of care when 5-to-6 hours elapsed from the time the consulting physician was reached, at 2:40 a.m., and 8:02 a.m when the evaluation by the consulting physician actually occurred. Dr. Barclas claims that the emergency room physician should have re-paged the consulting physician when it became apparent that plaintiff had not been seen by consultant physician. According to Dr. Barclas, if not for these delays, and the more than 11 hour delay between the hand/plastic surgery consult at 8:02 a.m. and plaintiff's presentation in the operating room at 5:20 p.m, the chances for successful reattachment of the distal fragment would have been higher and the complete amputation of the distal portion of plaintiff's finger could have been avoided.

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment when it establishes that in treating the plaintiff it did not depart from good and accepted medical practice or that any such departure was not the proximate cause of the plaintiff's alleged injuries (*Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]). Once a defendant hospital meets its burden, the plaintiff must rebut defendant's prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*id.*). Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002]). Additionally, plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307, 833 NYS2d 89 [2007] [citation omitted]). However, if "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz* at 544). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice," do not suffice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]).

Defendant established prima facie that its emergency and surgical treatment of plaintiff did not depart from accepted medical practices and was not the proximate cause of the amputation of plaintiff's fingertip through the submission of its records and Dr. Stauch's

affirmation (*see Ortiz v Vernenkar*, 101 AD3d 637 [1st Dept 2012]; *Negron v St. Barnabas Nursing Home*, 105 AD3d 501 [1st Dept [2013]). In opposition, plaintiff fails to raise a triable issue of fact. Although the affirmation of plaintiff's expert may raise questions of fact concerning possible departures from medical standards on defendant's part with respect to the alleged delays in plaintiff's treatment, plaintiff has failed to present a nonspeculative basis for finding that any act or omission by defendant was the proximate cause of plaintiff's amputation. (*see Nieves v City of New York*, 91 AD2d 938, 939 [1st Dept [1983]). Dr. Barclas' conclusion that defendant's delay in treatment reduced the chances for successful re-attachment of plaintiff's fingertip is based upon Dr. Barclas' speculation, which is not supported by the hospital records, that the consulting physician may have been of the opinion that there was a possibility that the fingertip was viable and could have been saved. Such speculation falls far short of the reasonable degree of medical certainty standard that an expert opinion is required to meet and thus does not raise a triable issue of fact (*Bullard v St. Barnabas Hosp.* 27 AD3d 206 [1st 2006]; *see DeFilippo v N.Y. Downtown Hosp.*, 10 AD3d 521 [2006]).

To the extent plaintiff is asserting a lack of informed consent claim[1] it should be dismissed as plaintiff has failed to establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). In fact, Dr. Barclas's affirmation and plaintiff's opposition papers do not address defendant's argument that the lack of informed consent claim should be dismissed (*see Tom v Sundaresan*, 170 AD3d 479 [1st Dept 2013]). In light of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant movant is to serve a copy of this order, with notice of entry, upon plaintiffs within 20 days of entry.

Dated: MAY 20 2014
New York County

FILED
MAY 21 2014
COUNTY CLERK'S OFFICE
NEW YORK

George J. Silver, J.S.C.
HON. GEORGE J. SILVER

[1] The verified complaint does not allege a lack of informed consent cause of action but the verified bill of particulars alleges that defendant was negligent in, *inter alia*, negligently and carelessly failing to warn plaintiff of the dangerous effects of the treatments administered and in failing to secure plaintiff's informed consent thereto.